



Australian Government
Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

FOI/2013/005IR

FREEDOM OF INFORMATION ACT 1982

REQUEST BY: Ms Caitlin Huntington
DECISION BY: Ms Renée Leon
Deputy Secretary (Governance)

Request for internal review

In an email of 29 March 2013 the applicant requested internal review of a decision under the *Freedom of Information Act 1982* (the FOI Act) dated 15 February 2013 made by Mr Jamie Fox, First Assistant Secretary, Ministerial Services Division.

The terms of the applicant's FOI request were as follows:

I wish to obtain copies of:

- A. all travel arrangements for the week of 6 to 12 October 2008 for departmental Senior Executive Service officer Dr Gordon de Brouwer (i.e. airfares, hire cars; taxi use; hotel bookings).
- B. all records of attendance by Dr Gordon de Brouwer at the Prime Minister's Sydney residence known as Kirribilli House in the week of 6 to 12 October 2008 (i.e. times and dates of arrival and departure).

The applicant's request for internal review is in the following terms:

I am writing to request an internal review of Department of the Prime Minister and Cabinet's handling of my FOI request 'Travel arrangements and guest logs'.

I think that it is entirely inconceivable that the Department of the Prime Minister and Cabinet has "lost" records relating to Kirribilli House. It is patently the case that the Department does not wish to exert itself in finding the relevant documents, or it wishes to be wilfully ignorant of their existence.

Again, I assert that documents relating to Kiribli House and the Official Establishments Trust were, at the relevant time, part of the Department of Prime Minister and Cabinet, and accordingly the records are within the possession of the Department of Prime Minister and Cabinet, or the Department of Prime Minister and Cabinet has a constructive knowledge of their present whereabouts.

If it assists you, I am mostly interested in attendance on Friday 10 October 2008; the night of the infamous “what’s the G20” phone conversation with former US president George W. Bush.

I understand the applicant’s request for internal review is limited to Mr Fox’s decision on Part B of the FOI request.

Section 54B The FOI Act provides that an application for internal review must be made within 30 days, or such further period as the agency allows, after the day the decision is notified to the applicant. While the application for internal review was received outside of the 30-day period, the Department advised the applicant on 8 April 2013 that the period for making the application had been accepted by allowing a further period of time for lodgement.

Primary decision

In his decision of 15 February 2013, Mr Fox refused Part B of the applicant’s FOI request on the grounds that all reasonable searches had been conducted and no relevant documents existed (subparagraph 24A(1)(b)(ii) of the FOI Act).

In his decision, Mr Fox stated that he undertook the following searches in relation to Part B of the FOI request:

I have been advised that Dr de Brouwer has reviewed his records regarding travel to Kirribilli House in the week of 6 – 12 October 2008. As a result of this search, no documents were identified as relevant to the request.

As the Department does not maintain any documents containing listings of attendances at Kirribilli House, I do not consider a search of any other location in the Department for the requested documents would be reasonable in the circumstances.

In light of these reasons I am satisfied that no relevant document exists in the possession of the Department.

Authorised decision maker

I am authorised to make this decision in accordance with arrangements approved by the Secretary under section 23 of the FOI Act.

Internal review decision

I have decided to affirm Mr Fox’s decision that the request should be refused under subparagraph 24A(1)(b)(ii) of the FOI Act.

Reasons for decision

The issue raised by the applicant in her request for internal review is whether the Department’s searches for documents relevant to Part B of the FOI request were adequate.

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 'Guidelines issued by the Australian Information Commissioner under s 93A of the *Freedom of Information Act 1982*' (the FOI Guidelines) state that an agency can refuse a request for access to a document if it can show that it has taken all reasonable steps to locate it and has determined that the document cannot be found or does not exist.¹ The FOI Guidelines state 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.² Where a document is not and would not have been expected to be in an agency's possession, the agency is required to explain why.³

I have reviewed the searches conducted by Mr Fox in relation to Part B of the FOI request in the light of the FOI Guidelines and the applicant's contentions. It is not apparent to me what other searches the Department could reasonably conduct to identify documents which, as noted by Mr Fox in his decision, the Department does not keep. In any case, I have taken the step of again consulting Dr de Brouwer about whether he holds any documents, and he has confirmed that he holds no documents relevant to Part B of the FOI request.

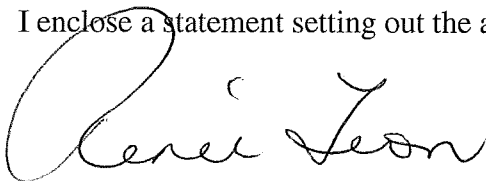
I consider that the searches undertaken by Mr Fox were reasonable in the circumstances and that documents relating to Part B of the FOI request do not exist. I therefore affirm Mr Fox's decision to refuse Part B of the FOI request under subparagraph 24A(1)(b)(ii) of the FOI Act.

Processing charges

Mr Fox advised in his decision that the outstanding balance of the processing charge is \$98.25. Documents that can be released in accordance with Mr Fox's decision will be provided to the applicant on receipt of payment of the outstanding balance of the processing charge.

Review and complaint rights

I enclose a statement setting out the applicant's rights of review and complaint.



Ms Renée Leon
Deputy Secretary (Governance)

22 April 2013

¹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (March 2013) [8.40]
<http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines>

² Ibid, [3.54].

³ Ibid, [8.43].



Freedom of information – Your review rights

July 2012

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see FOI fact sheet 13 – *Freedom of information: How to make a complaint*.

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.


Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

online: www.oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
fax: +61 2 9284 9666
email: enquiries@oaic.gov.au
in person: Level 8, Piccadilly Tower
133 Castlereagh Street
Sydney NSW



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.



What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. There is a fee for lodging an AAT application, although there are exemptions for health care and pension concession card holders, and the AAT can waive the fee on financial hardship grounds. For further information see www.aat.gov.au/FormsAndFees/Fees.htm.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992

email: enquiries@oaic.gov.au

write: GPO Box 2999, Canberra ACT 2601
or visit our website at www.oaic.gov.au



Freedom of information – How to make a complaint

October 2010

You may complain to the Australian Information Commissioner if you have concerns about how an Australian Government agency handled a request for documents under the *Freedom of Information Act 1982* (the FOI Act) or took any other action under that Act. If you are unhappy with the agency's decision about giving or refusing access to documents, you should ask for the decision to be reviewed, which is a separate process.

Disagree with an FOI decision?

If you disagree with an agency's or minister's decision on your request under the FOI Act, you have the right to have the decision reviewed. You can ask an agency to review its decision internally. You also have the right to ask the Information Commissioner to review an agency's or minister's decision. See **FOI Fact Sheet 12 Freedom of information – Your review rights** for more information about the review process.

If you are concerned about the way an agency has handled your matter, you can complain to the Information Commissioner.

What are the powers of the Information Commissioner?

The Information Commissioner can investigate a complaint about how an agency handled an FOI request, or other actions the agency took under the FOI Act. The Information Commissioner cannot investigate a complaint about a minister.

In conducting the investigation the Information Commissioner has the power to:

- make inquiries of an agency
- obtain information from any person
- take possession of, or inspect, any relevant documents.

If the Information Commissioner decides to investigate your complaint, the agency you have complained about will be notified in writing of the complaint. The Information Commissioner conducts investigations of complaints in private.

Who can make a complaint?

Any person can make a complaint about the actions of an agency in relation to an FOI activity. You do not need to have requested documents under the FOI Act.

When should I make a complaint?

You can complain to the Information Commissioner at any time. If your complaint relates to an FOI request you can make the complaint at any stage of the process.

Before making a complaint to the Information Commissioner, you should contact the agency directly to try to resolve your concerns. The Information Commissioner may decide not to investigate your complaint if you have not raised your concerns first with the agency or you have not given the agency a reasonable opportunity to deal with your complaint.



How do I make a complaint?

Your complaint must be in writing and must specify the agency you are complaining about. You can send your complaint to us using the details at the end of this fact sheet. A complaint form is also available on our website at www.oaic.gov.au.

If you need help we can assist you. You can contact us on 1300 363 992 or by email to enquiries@oaic.gov.au.

What information do I need to put in the complaint?

To help the Information Commissioner give the best consideration to your complaint, please provide as much relevant information as possible. Be clear about the issues in your complaint and what action or outcome you would like to see as a result.

Is there a fee for making a complaint?

No. There are no costs involved in making a complaint to the Information Commissioner.

What will happen to my complaint?

An officer of the Information Commissioner will contact you to discuss your complaint and you will be kept informed of the progress of your complaint along the way.

Before deciding whether to investigate your complaint the Information Commissioner may make preliminary inquiries of the agency you have complained about.

If the Information Commissioner decides to investigate your complaint, the Commissioner will write to the agency and request information to assist with the investigation.

Can the Information Commissioner decide not to investigate my complaint?


Yes. The Information Commissioner may decide not to investigate, or may discontinue an investigation, if:

- your complaint does not concern an agency's action under the FOI Act
- it is more appropriate for you to complain to another body (such as the agency or the Commonwealth Ombudsman)
- it is more appropriate for you to ask for the decision to be reviewed
- the agency you complained about has dealt with your complaint, or is in the process of dealing with it
- your complaint is frivolous, lacking in substance or not made in good faith
- you do not have sufficient interest in the matter.

If the Information Commissioner decides not to investigate or discontinues an investigation, the Commissioner will notify you and the agency of the reasons for this in writing.

How will my complaint be resolved?

In some cases the Information Commissioner's investigation and intervention may result in the agency addressing the issues that you have complained about. In other cases the Information Commissioner may make suggestions or recommendations that the agency should implement. You and the agency will be notified in writing of the outcome of the investigation.



If an agency fails to take adequate and appropriate action to implement any recommendations, the Information Commissioner may issue a formal implementation notice. This notice requires the agency to explain what action it will take to implement the recommendations. The Information Commissioner may also provide a written report to the minister responsible for the agency, and the report will be tabled in Parliament.

Your name will not be included in the report unless there is a special reason and you were first consulted.

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint and all relevant documents must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

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