



Australian Government

Department of Communications and the Arts

Mr Richard Smith

Right to Know

(via email: foi+request-4016-a21c3fdb@righttoknow.org.au)

18 October 2017

Dear Mr Smith

Freedom of Information Request FOI 17-1718 - Access Decision

I refer to your email of 21 August 2017 to the Department of Communications and the Arts (the Department) requesting access to documents under section 15 of the *Freedom of Information Act 1982* (Cth) (the **FOI Act**).

I am an officer authorised by the Secretary under subsection 23(1) of the FOI Act to make decisions about requests for access to documents under the FOI Act.

I have made a decision on your request, and provide you with notice in writing of my decision.

A. BACKGROUND

1. On 21 August 2017, you requested access under section 15 of the FOI Act to:

"...a) Documents detailing any correspondence received within the period between 1 Jan 2015 and 10 August 2017 from Foxtel Cable Television Pty Limited (including its owners, agents and/or contractors) to the Department of Communications and the Arts requesting the payment of moneys (either compensation or grants or funding) by the Commonwealth to Foxtel Cable Television Pty Limited;

b) Documents detailing any correspondence received within the period between 1 Jan 2015 and 10 August 2017 from Austar Entertainment Pty Ltd (including its owners, agents and/or contractors) to the Department requesting the payment of moneys (either compensation or grants or funding) by the Commonwealth to Austar Entertainment Pty Ltd;

c) Documents detailing any correspondence sent within the period between 1 Jan 2015 and 10 August 2017 from the Department to Foxtel Cable Television Pty Limited (including its owners, agents and/or contractors) concerning the payment of moneys (either compensation or grants or funding) by the Commonwealth to Foxtel Cable Television Pty Limited;

d) Documents detailing any correspondence sent within the period between 1 Jan 2015 and 10 August 2017 from the Department to Austar Entertainment Pty Ltd (including its owners, agents and/or contractors) concerning the payment of moneys (either compensation or grants or funding) by the Commonwealth to Austar Entertainment Pty Ltd; and

e) Documents relating to the Commonwealth Department of Communications and the Arts's consideration and decision, including any directions to Department staff from the Minister of Communications and the Arts, within the period between 1 Jan 2015 and 10 August 2017 to make a payment of moneys (either compensation or grants or funding) to either Foxtel Cable Television Pty Limited or Austar Entertainment Pty Ltd, including to the owners of the two respective companies.

For the avoidance of doubt, my request for Documents above also includes copies of any correspondence described in each of my requests a) through e)...

my requests a) through d) are for lists of correspondence as described, this is a request for a copy of each piece of correspondence, if any, identified in each of my requests a) through d). ..."

2. On 1 September 2017, the Department acknowledged your request.

3. On 20 September 2017, the Department notified you of the delegated decision-maker's intention to refuse your request on the basis of practical refusal as your request, as originally framed, did not satisfy the requirement in paragraph 15(2)(b) of the FOI Act. Paragraph 15(2)(b) provides that in making a FOI request, the request must provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency to identify it.

4. The Department's notice invited you to consult with the Department's FOI Coordinator to refine the scope of your request.

5. On 20 September 2017, the Department also applied to the Office of the Australian Information Commissioner (OAIC) for an extension of the processing period under section 15AC of the FOI Act.

6. On 21 September 2017, the Department was notified of the OAIC's approval of an extension of time under subsection 15AC(5) of the FOI Act to 20 October 2017.

7. On 4 October 2017, the Department received an email from you indicating that you wished to amend the scope of your request as follows:

"... a) For each of my requests a) through e) I would be amenable to removing the part of the request that includes "including its owners, agents and/or contractors". This would allow the Department's search of its correspondence to be limited to just the two corporate bodies, i.e. Foxtel and Austar.

b) For my request e) I would be amenable to removing the part of the request that includes "including to the owners of the two respective companies. ..."

8. On 5 October, the Department received a further email from you which stated:

"... I confirm that neither my original nor amended request intended to include in its scope any documents relating to the invoicing or payment of accounts by the Department for any services provided to the Department where the Department is a customer of either of the two pay TV companies.

My request for Government information was specifically directed at payment of grants and/or funding intended to be used by either pay TV operator for their commercial activities and for which there was no commercially based customer/supplier agreement in place".

9. On 5 October 2017, the FOI Coordinator requested the Assistant Secretary Media Branch to conduct searches for the requested documents.

10. On 10 October 2017, on the advice of officers in the Media Branch, the FOI Coordinator also requested the Executive Adviser to the Secretary to conduct searches for the requested documents.

11. On 12 October 2017, on the advice of the Executive Adviser, the FOI Coordinator also requested the Chief Information Officer to conduct searches for the requested documents.

12. On 12 October 2017, Assistant Secretary Media Branch advised the FOI Coordinator that no documents within the scope of your request were found.

13. On 16 October 2017, the acting Secretary advised the FOI Coordinator that 10 documents containing 52 pages were potentially within the scope of your request. However, on examination of the documents it was determined that these documents were not within the scope of your request.

14. On 17 October 2017, the Chief Information Officer advised the FOI Coordinator that: "Given the criteria of 1 January 2015 – 10 August 2017, of the three former Secretaries within scope, the Department has completed extensive searches of the e-mail accounts of the two most recent Secretaries (spanning 15 September 2015 – 10 August 2017) and has found no relevant e-mail correspondence in either. Based on the time constraints and the effort and expense that would be required to retrieve archived data for the final search, considering that there has been no other indication that this correspondence exists, I do not believe it would be practical to do so".

B. DECISION

15. I have decided to refuse your request for access under section 24A of the FOI Act.

C. MATERIAL ON WHICH MY DECISION IS BASED

16. I base my decision on the following material:

- a. your access request, dated 21 August 2017, and revised request, dated 4 October 2017;

- b. the relevant provisions of the FOI Act;
- c. the *Australian Information Commissioner's FOI Guidelines* made under section 93A of the FOI Act (the 'FOI Guidelines');
- d. relevant case law;
- e. the Department's *FOI Policy*;
- f. information and advice from the Department's FOI Coordinator; and
- g. information and advice from the Chief Information Officer, the Executive and officers within the Department's Media Branch.

D. FINDINGS ON MATERIAL QUESTIONS OF FACT

17. I find that despite thorough searches and inquiries within the Department having been undertaken to locate documents falling within the scope of your revised request, no documents were found.

E. REASONS FOR DECISION

18. Section 24A of the FOI Act states that an agency may refuse a request for access to a document if all reasonable steps have been taken to find the document and the agency or Minister is satisfied that the document is in the agency's or Minister's possession but cannot be found or does not exist.

19. Based on the findings on material questions of fact set out above, all reasonable steps have been taken to find the document. I am satisfied that either the document is in the Department's possession but cannot be found or the document does not exist.

F. REVIEW RIGHTS

20. This decision may be subject to review under section 54, section 54A, section 54L or section 54M of the FOI Act. I have attached the Office of the Australian Information Commissioner's *FOI fact sheet 12: Your review rights*.

Yours sincerely

Legal Director
Office of the General Counsel
Position Number 112404

Attachment 1 *FOI fact sheet 12: Your review rights*