



26 April 2018

Our reference: LEX 35849

Mr Justin Warren

By email only: foi+request-4373-ac3db2f7@righttoknow.org.au

Dear Mr Warren

Freedom of Information request – Internal Review Decision

You requested an internal review of the decision made by an authorised decision maker (**original decision maker**) of the Department of Human Services (**department**) under the *Freedom of Information Act 1982 (FOI Act)*, dated 26 March 2018 (LEX 34896) (**original decision**). Your request for internal review was received by the department on 26 March 2018.

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act, and my decision is set out below.

Internal review decision

As the authorised internal reviewer, I have made a fresh decision in relation to your request.

Section 24(1) of the FOI Act provides that the department may refuse to give access to documents in accordance with an FOI request if:

- a practical refusal reason exists in relation to the request; and
- following a consultation process (under section 24AB of the FOI Act), the department is satisfied that the practical refusal reason still exists.

Section 24AA(1)(b) of the FOI Act provides that a practical refusal reason exists in relation to a request for a document if the request does not satisfy the requirement in section 15(2)(b) of the FOI Act (identification of documents).

Section 15(2)(b) of the FOI Act provides that a valid FOI request must:

provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it.

I have found that your request, as revised and taking into account the further details provided in your request for internal review, does not satisfy the requirement in section 15(2)(b) of the FOI Act, in that it does not provide sufficient information to enable the department to identify the documents you are seeking.

The reasons for my decision, including the relevant sections of the FOI Act, are set out in **Attachment A**.

You can ask for a review of my decision

If you disagree with my decision, you can apply for an external review by the Office of the Australian Information Commissioner. You do not have to pay for reviews of decisions. See **Attachment B** for more information about how arrange a review.

Further assistance

If you have any questions please email FOI.LEGAL.TEAM@humanservices.gov.au.

Yours sincerely

Alice

Authorised FOI Decision Maker
Freedom of Information Team
FOI and Litigation Branch | Legal Services Division
Department of Human Services



Attachment A

REASONS FOR DECISION

Original decision

On 26 February 2018, you made a request for access under the FOI Act in the following terms:

I request a copy of any documents that define how a decision is, or was, made to replace a document on the department's operational information website (those hosted on <http://operational.humanservices.gov.au/>) with a statement of the form:

"The guideline you have requested is potentially FOI exempt.

You have a right to apply for the document through FOI legislation.

You can request a copy from the department's Information Publication Scheme by:

..." etc.

I request only final versions of these documents, not draft versions.

On 16 February 2018, the original decision maker sent you a notice under section 24AB(2) of the FOI Act (**section 24AB letter**). In the section 24AB letter, the department informed you that it could not identify the documents you were requesting. The department gave you an opportunity to consult with it to revise your request so as to remove the practical refusal reason.

On 16 February 2018, you responded to the section 24AB letter to seek assistance in revising the scope of your request. You also stated:

I am only requesting the formal procedure used to determine if a document that would otherwise have been published on the operational.humanservices.gov.au website to be replaced with this boilerplate text.

If different procedures have been used over time, then I request the documented procedure that was used at the time a website document was replaced with the "possibly FOI exempt" boilerplate, but only if that website document continues to be in that redacted form as at the date of my request. If the website document is no longer redacted, then I am unconcerned with if it was redacted at some point in the past or the procedure used for its redaction.

On 22 February 2018, the department wrote to you for the purpose of assisting you to revise the scope of your request. The department suggested that you could consider limiting:

- the scope of your request to specific Operational Blueprint files or to documents related to a specific business area of the department; and
- the timeframe of the documents within scope of your request, noting that Operational Blueprint files are frequently updated.

On 26 February 2018, you revised the scope of your request in the following terms:

I alter the scope of my request to be for the first 63 procedures used in reverse chronological order from the date of my request (i.e. going backwards in time from the date of my request), or fewer if less than 63 procedures have been used (**revised request**).

On 28 February 2018, the department wrote to you to confirm the revised scope set out above.

On 26 March 2018, the original decision maker notified you of the original decision, namely that your revised request was refused on the basis that you did not provide sufficient information to enable the department to identify the documents you requested.

On 26 March 2018, you sought internal review of the original decision. In your request for internal review, you advised that:

Firstly, the department has, once again, failed to take reasonable steps to assist me to revise the request so that the practical refusal reason no longer exists, as required by section 24AB of the FOI Act. The department could have sent another email advising me that my request would still likely be refused. The department could have provided the information I explicitly asked for in my email: "an order of magnitude estimate of how many procedures there are" but it did not.

Secondly, it appears that the department is being deliberately obtuse in its interpretation of the revised scope. It should be abundantly clear that I am asking for procedures used to make a determination of whether or not a document on the operational website should be marked FOI exempt or not. My expectation was that there would be fewer than 6, as I clearly said. Nevertheless, in attempting to guess at the inner workings of the department, I picked an arbitrary number of procedures (63) and requested a copy of up to this many procedures, based on when they were last used, going backwards in time from the date of my request.

If this was not sufficiently clear, then the department could readily have asked me to further clarify my request. It failed to do so, and also failed to provide further assistance to reduce the scope of my request to avoid a practical refusal reason. This implies that the department is deliberately seeking to frustrate FOI requests by being uncooperative with good faith efforts to use the FOI process. I cannot see an alternate explanation for the facts before me.

Thirdly, the department appears to be deliberately frustrating my attempts to speak to someone within the FOI department in order to clear up misunderstandings in a way that would minimise the amount of effort and time taken. The department has my phone number and could call it whenever they like. Similarly, I am happy to call a switchboard number that can be transferred to the department in order to speak to the contact person nominated for the consultation period. That the department continues to refuse to engage in this way indicates a deliberate refusal to fulfil its obligations under the Act.

What I took into account

In reaching my decision, I took into account:

- your original request;
- your revised request;
- the original decision;
- all other correspondence between the department and yourself in relation to the original decision and your request for internal review;
- consultations with departmental officers about:
 - the nature of the requested documents; and
 - the department's operating environment and functions;
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**); and
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act, including internal review decisions under section 54C of the FOI Act.

For the reasons that follow, I have decided to affirm the original decision.

Consultation process

In your request for internal review, you contend that the department failed to take reasonable steps to assist you to revise your request so as to remove the practical refusal reason, as required by section 24AB of the FOI Act.

Section 24AB of the FOI Act provides:

- (3) If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or Minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists.
- (4) For the purposes of subsection (3), *reasonable steps* includes the following:
 - (a) giving the applicant a reasonable opportunity to consult with the contact person;
 - (b) providing the applicant with any information that would assist the applicant to revise the request.

As required by section 24AB(4)(a), the department provided you with a 14 day consultation period and the details of a contact officer to liaise with during the consultation period for assistance.

As required by section 24AB(4)(b), the department provided you with information to assist you to revise your request by:

- sending a section 24AB letter, dated 16 February 2018, which:
 - stated that the department intended to refuse your request because a practical refusal reason existed;
 - identified the practical refusal reason, namely, that your original request did not provide information concerning the documents you were requesting that was reasonably necessary to enable the department to identify those documents;
 - provided you examples of the ways in which your original request could be interpreted to assist you to identify the interpretation that you intended.
- responding to your email on 22 February 2018, suggesting that you could consider limiting:
 - the scope of your request to specific Operational Blueprint files or to documents related to a specific business area of the department; and
 - the timeframe of the documents within scope of your request, noting that Operational Blueprint files are frequently updated.

Accordingly, I find that the department properly conducted the request consultation process pursuant to section 24AB of the FOI Act.

Practical refusal reason

Section 24(1) of the FOI Act provides that the department may refuse to give access to documents in accordance with an FOI request if:

- a practical refusal reason exists in relation to the request; and
- following a consultation process (under section 24AB of the FOI Act), the department is satisfied that the practical refusal reason still exists.

Section 24AA(1)(b) of the FOI Act provides that a practical refusal reason exists in relation to a request for a document if the request does not satisfy the requirement in section 15(2)(b) of the FOI Act (identification of documents).

Section 15(2)(b) of the FOI Act provides that a valid FOI request must:

provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it.

Your revised scope, for 'the first 63 procedures used in reverse chronological order from the date of my request' (used to determine whether or not a document is to be made publicly accessible) does not provide information reasonably necessary to enable a responsible officer of the department to identify the documents you seek.

This is because the request could be interpreted in a number ways. As advised in the original decision, it remains that your request could be interpreted to be for:

- the 63 most recent Operational Blueprints (marked as “possibly FOI exempt”) that were *published* on the operational.humanservices.gov.au website, as at the date of your request;
- the 63 most recent Operational Blueprints that were previously published but re-marked as “possibly FOI exempt” on the operational.humanservices.gov.au website, as at the date of your request; or
- the 63 most recent Operational Blueprints (marked as “possibly FOI exempt”) that were *accessed* on the operational.humanservices.gov.au website as at the date of your request.

I note that you provided additional information in your request for internal review. Specifically, in your request for internal review, you advised that:

I am asking for procedures used to make a determination of whether or not a document on the operational website should be marked FOI exempt or not.

I have considered this statement and consulted with departmental officers about the nature of your request. In light of this, whilst it is unclear whether you intended to revise the scope of your request on review in this way, the department would likely be able to process the request in this form. However, because you have provided a significant amount of other information in your request for internal review, I cannot assume that this is your intended scope.

Because of this and the fact that it remains unclear what you mean by ‘the first 63 procedures used in reverse chronological order from the date of my request (i.e. going backwards in time from the date of my request), or fewer if less than 63 procedures have been used’, a practical refusal reason exists in relation to your request. That is, your request did not provide such information as is reasonably necessary to enable the department to identify the documents that are being requested.

Accordingly, it remains that your request on review does not satisfy the requirement in section 15(2)(b) of the FOI Act, in that it does not provide sufficient information to enable the department to identify the documents you are seeking.

On that basis, I refuse your request under section 24(1) of the FOI Act.



Attachment B

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Asking for a full explanation of a Freedom of Information decision

Before you ask for a formal review of a FOI decision, you can contact us to discuss your request. We will explain the decision to you. This gives you a chance to correct misunderstandings.

Asking for a formal review of an Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of the decision. Under section 54L of the FOI Act, you can apply for a review of an FOI decision by the Australian Information Commissioner.

Note 1: There are no fees for these reviews.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision.

If you do not receive a decision from an Internal Review Officer in the department within 30 days of applying, you can ask the Australian Information Commissioner for a review of the original FOI decision.

You will have 60 days to apply in writing for a review by the Australian Information Commissioner.

You can **lodge your application:**

Online: www.oaic.gov.au

Post: Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

Note 3: The Office of the Australian Information Commissioner generally prefers FOI applicants to seek internal review before applying for external review by the Australian Information Commissioner.

Important:

- If you are applying online, the application form the 'Merits Review Form' is available at www.oaic.gov.au.
- If you have one, you should include with your application a copy of the Department of Human Services' decision on your FOI request.
- Include your contact details.

- Set out your reasons for objecting to the department's decision.

Complaints to the Australian Information Commissioner and Commonwealth Ombudsman

Australian Information Commissioner

You may complain to the Australian Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act, There is no fee for making a complaint. A complaint to the Australian Information Commissioner must be made in writing. The Australian Information Commissioner's contact details are:

Telephone: 1300 363 992
Website: www.oaic.gov.au

Commonwealth Ombudsman

You may also complain to the Commonwealth Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman's contact details are:

Phone: 1300 362 072
Website: www.ombudsman.gov.au

The Commonwealth Ombudsman generally prefers applicants to seek review before complaining about a decision.