



Australian Government

Department of Broadband,
Communications and the Digital Economy

Our reference: FOI 26-1112

Your ref: foi+request-44-a8c2ac83@righttoknow.org.au

FREEDOM OF INFORMATION REQUEST No. 26-1213

Mr Mark Newton, Right to Know

**STATEMENT OF REASONS
INTERNAL REVIEW OF ACCESS DECISION**

I, Simon Ash, General Manager, Corporate and Business Division:

- (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982 (the FOI Act)* to make decisions about access to documents under the FOI Act;
- (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision, and
- (c) having conducted a review, following a request made under subsection 54(1) of the FOI Act, of a decision made by Andrew Madsen, Assistant Secretary, Governance Branch on 18 February 2013,

make the following statement setting out my findings on material questions of fact, referring to the evidence or other material upon which those findings were based and giving the reasons for my decision.

A. BACKGROUND

1. On 17 January 2013, Mr Mark Newton (**the Applicant**) emailed the Department seeking access under section 15 of the FOI Act to documents held by the Department (**the FOI request**). Specifically, the Applicant's FOI request states:

Documents released under FOI in late 2012 indicate that DBCDE contracted out the development of "Cybersafety Help Button" applications for various platforms to third party software developers.

I request disclosure under the Freedom of Information Act of source code delivered to the Commonwealth pursuant to relevant software development agreement.

2. On 18 February 2013, Mr Andrew Madsen, a delegate in the Department under subsection 23(1) of the FOI Act, decided to refuse the Applicant's FOI request under section 24A of the FOI Act. The Department by letter dated 18 February 2012 advised the Applicant of this decision.
3. The Applicant on the same day (18 February 2013) emailed the Department seeking an internal review of its decision under subsection 54(1) of the FOI Act.

B. DECISION

4. On internal review of this matter under subsection 54(1) of the FOI Act, I have decided to affirm the Department's decision dated 18 February 2012. That is, I agree with the Department's decision dated 18 February 2012 to refuse the Applicant's FOI request under section 24A of the FOI Act.

C. MATERIAL ON WHICH THE INTERNAL REVIEW IS BASED

5. I based my findings of fact on the following material:
 - the FOI Act;
 - the Freedom of Information Guidelines made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (**the OAIC Guidelines**);
 - the Department's *Guidelines for Processing Freedom of Information Requests* (July 2011); and
 - the Applicant's emails dated 17 January 2013 and 18 February 2013.

D. REASONS FOR DECISION ON INTERNAL REVIEW

'Document' and 'Document of an agency' under the FOI Act

6. Section 15 of the FOI Act provides that a person who wishes to obtain access to a document of an agency may request access to the document. The first issue for consideration is whether the documents the subject of the FOI request, the source codes of the Cybersafety Help Button, are documents for the purposes of the FOI Act.
7. A document is defined in section 4 of the FOI Act to include any or any part of the following:
 - any paper or other material on which there is writing;
 - any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
 - any article on which information has been stored or recorded, either mechanically or electronically; and
 - any other record of information.
8. The OAIC Guidelines also provide that the definition of a 'document' under section 4 of the FOI Act also includes information stored on computer tapes, disks, DVDs and portable hard drives and devices.
9. In my view, source codes are written in human readable computer language and as such, can be understood by computer users, programmers or system administrators, and are stored on a computer's hard-disk or a database. As a result, I am satisfied that source codes of the Cybersafety Help Button constitute 'documents' for the purposes of the FOI Act.
10. Under section 4 of the FOI Act, a document is a document of an agency if (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or (b) in order to comply with section 6C of the FOI Act, the agency has taken contractual measures to ensure that it receives the document. Section 6C of the FOI Act applies to Commonwealth contracts.

11. Section 4 of the FOI Act provides that a Commonwealth contract means a contract to which all of the following apply:
- (a) *the Commonwealth or an agency is, or was, a party to the contract;*
 - (b) *under the contract, services are, or were, to be provided:*
 - i. *by another party; and*
 - ii. *for or on behalf of an agency; and*
 - iii. *to a person who is not the Commonwealth or an agency;*
 - (c) *the services are in connection with the performance of the functions, or the exercise of the powers, of an agency.*
12. In my view, the contract between the Commonwealth and the Service Contractor who provided the source codes for the Cybersafety Help Button is not a Commonwealth contract under the FOI Act, because the contract was not for services provided to a person who is not the Commonwealth or an agency (the services provided by the Service Contractor was to the Commonwealth as represented by the Department). Accordingly, I am of the view that section 6C of the FOI Act has no application to the circumstances of this matter.

Request may be refused if documents cannot be found

13. Section 24A of the FOI Act 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.*

14. I note that the FOI Act is silent about what an Agency must do in terms of searching for documents that may be relevant to a request, that is, it does not provide guidance as to words 'reasonable steps'. Paragraph 3.43 of the OAIC Guidelines provides that:

Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practice in the agency's environment. At a minimum, an agency or minister should take comprehensive steps to locate a document, having regard to:

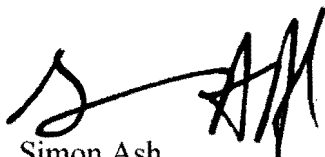
- *the subject matter of the documents;*
- *the current and past file management systems and the practice of destruction or removal of documents;*
- *the records management systems in place;*
- *the individuals within an agency who may be able to assist with the location of documents; and*
- *the age of the documents.*

15. Further, paragraph 3.45 of the OAIC Guidelines provides that the Information Commissioner considers that, as a minimum, an Agency should conduct a search by using existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.

16. The Department conducted a thorough search of its electronic (Information Management System) and hard copies file records. The Department also made necessary enquiries with the relevant staff, from the Information Technology Branch, Cybersafety Branch, and the Technical Advice Unit, as to their knowledge of any documents. The advice received from these staff members was that the Department was not in possession of any documents (source codes for the Cybersafety Help Button) the subject of this FOI request.
17. Therefore, I am satisfied that the Department has taken all reasonable steps to find the documents the subject of this FOI request and it has been unable to locate any such documents.
18. Accordingly, I affirm the original decision of the Department dated 18 January 2013 to refuse the Applicant's FOI request under section 24A of the FOI Act.

E. REVIEW RIGHTS

19. This decision is subject to review under s 54L(2)(b) of the FOI Act by the Information Commissioner of the Office of the Australian Commissioner. The Office of the Australian Information Commissioner's *FOI Fact Sheet 12 – Your review rights* is attached for your information.



Simon Ash
General Manager
Corporate and Business Division

18 March 2013