



Our Ref: LS4986

Ms Sophie Wrightman
Original by email: foi+request-470-f9b501f0@righttoknow.org.au

Dear Ms Wrightman

Re Your Freedom of Information Request No. LS4986

I refer to your email of 11 November 2013 addressed to the Australian Electoral Commission (AEC) in which you appear to be attempting to make a request for access to documents in the possession of the AEC under the *Freedom of Information Act 1982* (FOI Act) that contain the agreed terms for non-voting penalties. I also refer to the subsequent email from you dated 14 November 2013.

SUMMARY

I, Paul Pirani, Chief Legal Officer of the Australian Electoral Commission ('AEC'), am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

You requested access to document in the possession of the AEC that:

"...provide the terms where such penalties were agreed on between the AEC and those who have registered with the AEC to vote".

For the reasons set out below, I have refused your request pursuant to section 24A of the FOI Act as no such document exists.

Decision And Reasons For Decision

The legal basis for compulsory voting in a Federal election was explained to you in the email from Ms Sally Bolton of the AEC dated 12 November 2013. The compulsory voting obligation together with the offence for failing to vote at a Federal election is contained in section 245 of the *Commonwealth Electoral Act 1918* (Electoral Act).

The heading to section 245 of the Electoral Act is "Compulsory voting". A failure to attend a polling booth and vote is a criminal offence with fines of up to \$170 together with court costs being imposed. Further, a person who is convicted by the courts of failing to vote will have a criminal record.

This offence is a statutory offence that has been enacted by the Parliament pursuant to the power contained in the *Constitution*. As is the case with all criminal offences that have been enacted by the Parliament, they have nothing to do with any contractual agreement. The source of the obligation is found in the laws themselves that have been enacted by the Parliament.

The AEC notes that the legal basis for compulsory voting and the offence of failing to vote at a Federal election has been upheld recently in the case involving Mr Nils Anders Holmdahl. On 3 February 2012, Mr Holmdahl was convicted in the South Australian Magistrates Court of failing to vote at the August 2010 election. Mr Holmdahl appealed against the conviction to the Supreme Court of South Australia. The appeal was referred to the Full Court of the Supreme Court of South Australia which dismissed the appeal from Mr Holmdahl (see *Holmdahl v AEC (No.2)* [2012] SASCFC 110). Counsel for Mr Holmdahl argued that while the Constitution established a right to vote, the requirements of the Electoral Act which created the obligation to vote were unconstitutional.

The Court rejected this argument and held that:

"The Commonwealth electoral system, as described above, represents a system designed to support the election of the House of Representatives and of the Senate by the people of Australia. The *Commonwealth Electoral Act* has the purpose of ensuring representative democracy. The broad effect of the statute is to require all eligible persons to enrol as voters and then to require those electors to attend and vote. The terms of sections 245(1) and 245(15) establish a duty to vote and a failure to vote attracts a criminal sanction. It is difficult to understand how the obligation to enrol and the obligation on an elector to vote could detract from a representative democracy in which the people of Australia choose who is to represent them in the House of Representatives and in the Senate. To my mind, the *Commonwealth Electoral Act* is legislation enacted within power. It provides a relevant system in contemporary times to ensure that Australia is a representative democracy."

Mr Holmdahl lodged a special leave application with the High Court of Australia to appeal against the decision of the Full Court of the Supreme Court of SA. On 12 April 2013, Justices Hayne and Crennan of the High Court dismissed the special leave application (see *Holmdahl v AEC* [2013] HCA Trans 072).

Accordingly, the courts have clearly upheld the compulsory voting laws enacted by the Parliament that apply to the conduct of a Federal election. The AEC is charged with the responsibility of enforcing these laws. Any failure to attend a polling booth and voting in accordance with the requirements of the Electoral Act will result in action being taken in the criminal courts.

The above shows that the compulsory voting laws have force due to the operation of the Electoral Act which is a law that has been validly enacted by the Parliament. There is clearly no requirement at law that there should also be some contractual agreement between the AEC and individual electors as suggested in your email.

Section 24A of the Freedom of Information Act 1982 (FOI Act) provides that:

- "(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."

I have formed the view that the AEC does not have in its possession any document or other record that would contain "the terms where such penalties were agreed on between the AEC and those who have registered with the AEC to vote". Accordingly, your request is formally refused under section 24A of the FOI Act because the documents you are seeking do not exist.

YOUR REVIEW RIGHTS

If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to AEC for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: <https://forms.australia.gov.au/forms/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

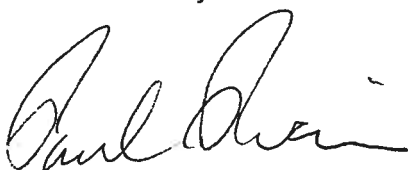
More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews.

Questions about this decision

If you wish to discuss this decision, please contact Owen Jones

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Yours sincerely



Paul Pirani
Chief Legal Officer

22 November 2013