



Statement of reasons made under the *Freedom of Information Act 1982*

Decision and reason for decision of Position Number 62210022

Applicant: Verity Pane
Decision date: 21 September 2018
FOI reference number: FOI 24050

Dear Verity Pane,

Freedom of Information Request: FOI 24050

1. I have made a decision to refuse access to the documents subject to your request, as the documents cannot be found or do not exist.

Summary

2. I, Position Number 62210022, am an officer authorised by the Secretary of the Department of Veterans' Affairs (the Department) to make decisions about access to documents in the possession of the Department in accordance with section 23(1) of the *Freedom of Information Act 1982* (the FOI Act).
3. On 18 July 2018, you made a request for access to documents in the possession of the Department. Your request sought access to:

"...Under FOI I seek copy of the invoice or invoices for external legal services expenditure by the Department, for advice received in FY2011/12, in relation to external legal advice sought by the Department about the implications of the publication of departmental correspondence reproduced on websites not controlled by the Department, by veterans, for the Department under the incoming Work, Health and Safety Act 2012 (Cth).

I understand from copies of Ministerial Briefs I have recently received copy of that such external legal services were commissioned by the Department in late 2011 - early 2012.

Was there a reason the Department did not make use of its own legal resources for interpretation of Commonwealth legislation?

Can you also advise if the practice of engaging expensive external legal services for statutory interpretation is a common practice in the Department..."

4. For the purpose of this decision I will refer to three parts of your request as follows:

Part A

"...Under FOI I seek copy of the invoice or invoices for external legal services expenditure by the Department, for advice received in FY2011/12, in relation to external legal advice sought by the Department about the implications of the publication of departmental correspondence reproduced on websites not controlled by the Department, by veterans, for the Department under the incoming Work, Health and Safety Act 2012 (Cth).

I understand from copies of Ministerial Briefs I have recently received copy of that such external legal services were commissioned by the Department in late 2011 - early 2012..."

Part B

"...Was there a reason the Department did not make use of its own legal resources for interpretation of Commonwealth legislation?"

Part C

"...Can you also advise if the practice of engaging expensive external legal services for statutory interpretation is a common practice in the Department..."

5. The Department would like to apologise for the delay in processing your request. A decision on your request was due by 17 August 2018. Unfortunately your request was missed as the email was placed in a different FOI file relating to you. Unfortunately this oversight meant that in accordance with section 15AC(3) of the FOI Act, the Department was taken to have made a decision personally refusing to give access. On 20 August 2018, the Department was made aware of this error, and steps were taken to process your request, with the aim of issuing you a decision. The Information Law section has taken steps to decrease the potential of this happening again and we would like to apologise for any inconvenience this may have caused you.

Decision and Reasons for Decision

Material taken into account

6. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to refuse access to the documents follows.
7. I have taken the following material into account in making my decision:
- the terms of your request;
 - the types of documents held by the Department in relation to the matters raised in your request;
 - Sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth. I also considered sections 15 (Requests for Access) and 24A (Requests may be refused if documents cannot be found, do not exist or have not been received) of the FOI Act which is relevant to my decision; and
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

8. A full extract of all FOI Act provisions used to make my decision are provided in Schedule 1.

Reasons for Decision

9. I have decided to refuse access to documents related to Part A of your request and consider Parts B and C of your request to be invalid in accordance with the following provisions of the FOI Act:

Documents cannot be found or do not exist (section 24 of the FOI Act)

Part A of your request

10. I have made a decision to refuse access to the documents subject to Part A of your request, as the documents cannot be found or do not exist. Section 24A of the FOI Act provides that 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.
11. I am satisfied that all reasonable steps have been taken to find information relevant to your request, having regard to:
- the terms of your request;
 - the types of documents that are in the possession of the Department;
 - the subject matter of the documents;
 - the current and past file management systems and the practice of orderly destruction or removal of documents;
 - the Department's record management systems and practices; and
 - the individuals and areas within the Department who may be able to assist with the location of the information.
12. Despite the reasonable searches undertaken, the Department has been unable to identify documents relevant to Part A of your request. A description of the searches undertaken to locate the documents which you are seeking to access is at Schedule 2.
13. On that basis, I am refusing your request for access to the information in accordance with section 24A of the FOI Act.

Requests for access (section 15)

Parts B and C of your request

14. In accordance with section 15(1) of the FOI Act, a person who wishes to obtain access to a document of an agency may request access to the document.
15. Parts B and C of your request do not seek access to documents. They are questions raised in relation to documents you wanted to seek access to at Part A. As noted above, documents in relation to Part A of your request could not be found or do not exist. As such, these aspects of your request are not requests for access to documents in accordance with section 15(1) of the FOI Act.

Your rights of review

16. If you are dissatisfied with my decision, you can ask for the decision to be reviewed. There are two ways you can ask for review of a decision: internal review by the Department, and external review by the Office of the Australian Information Commissioner (OAIC). We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal Review

17. Under section 54 of the FOI Act, you may apply in writing to the Department 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.
18. You must apply in writing and you can lodge your application in one of the following ways:

Post: Legal Services & Assurance, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: information.access@dva.gov.au

Information Commissioner Review

19. Under section 54L of the FOI Act, you may apply to the OAIC 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: www.oaic.gov.au
Post: Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001
Facsimile: (02) 9284 9666
Email: enquiries@oaic.gov.au
In person: Level 3, 175 Pitt Street, Sydney NSW.

20. More information about Information Commissioner Reviews is available from http://www.oaic.gov.au/publications/FOI_fact_sheet12_your_review_rights.html.

Contact us

21. If you wish to discuss this decision, please do not hesitate to contact me using the following details:

Post: Legal Services & Assurance, Department of Veterans' Affairs

GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: information.law@dva.gov.au

Yours sincerely

Position Number 62210022

Authorised officer

21 September 2018



Schedule of relevant provisions in the FOI Act

3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

- Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:
- (a) section 12 (documents otherwise available);
 - (b) section 13 (documents in national institutions);
 - (c) section 15A (personnel records);
 - (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

15 Requests for access

Persons may request access

- (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Requirements for request

- (2) The request must:
- (a) be in writing; and
 - (aa) state that the request is an application for the purposes of this Act; and
 - (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
 - (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

(see section 11A).

24A Requests may be refused if documents cannot be found, do not exist or have not been received

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.

Document not received as required by contract

- (2) An agency may refuse a request for access to a document if:
 - (a) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document; and
 - (b) the agency has not received the document; and
 - (c) the agency has taken all reasonable steps to receive the document in accordance with those contractual measures.



Summary of document searches

The Department conducted the following searches to identify files and documents that fall within scope of your request ("relevant documents").

1. Search of group drives for electronic documents

A search of the Department's electronic files did not identify any relevant documents.

2. Department notification of FOI request

An email notification of the FOI request was circulated to relevant area in the Department requesting that they conduct a search to identify whether documents relevant to the request exist. No relevant documents were identified.