



Internal review decision made under the *Freedom of Information Act 1982*

Internal review decision and reasons for decision of John (Position Number 62230915), Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant: Verity Pane
Date of primary decision: 18 October 2018
FOI reference number: FOI 24570
Internal review decision date: 14 November 2018
Internal review reference number: IR 25235
Sent by email: foi+request-4821-ce18163d@righttoknow.org.au

Dear Verity Pane,

Freedom of Information Request: FOI IR 25235

1. The purpose of this letter is to give you a decision about your request for internal review under the *Freedom of Information Act 1982* (FOI Act).
2. I have made a decision to affirm the original decision made by Legal Officer 62212962, Information Law Section, Legal Services and Assurance Branch in FOI 24570.

Authority to make this decision

3. I, John (Position Number 62209915), Information Law Officer, Information Law Section, am an officer authorised by the Secretary of the Department of Veterans' Affairs (the Department) to review decisions about access to documents in the possession of the Department in accordance with section 54C of the *Freedom of Information Act 1982* (the FOI Act).

Summary

4. On 19 September 2018, you made a request for access to the following documents in the possession of the Department. Your request specifically sought:

“...Under s 17, I apply for the audit log entries for the two below WORD documents to be printed from the audit log function in TRIM and copies provided to me:

- *FOI.23863 Decision and Statement of Reasons*
- *FOI.23863 Section 17 document...”*

5. As no extensions of time were applied to process your request, a decision on your request was due by 18 October 2018.
6. On 18 October 2018, you were provided with a decision relating to your request. That decision advised you that no documents matching the scope of your request could be found in the Department.
7. On 19 October 2018, you requested an internal review of the primary decision.
8. As no extensions of time have been applied to process this internal review, a decision on your request is due by 19 November 2018.

Decision

9. I have made a decision to affirm the original decision made by Legal Officer 62212962, Information Law Section, Legal Services and Assurance Branch in FOI 24570.

Material taken into account

10. In accordance with Section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those finding were based and the reasons for my decision to refuse access to documents follow.
11. I have taken the following material into account in making my decision:
 - the terms of your primary request;
 - the terms of your request for an internal review;
 - the types of documents that are in the possession of the Department;
 - 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 Section 24A that requests may be refused if documents cannot be found, do not exist or have not been received; and
 - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).

Reasons for Decision

12. Your request for an internal review focuses on two matters, that:
- (a) the Statement of Reasons was invalid; and
 - (b) the searches for documents was inadequate.
13. In accordance with section 53A of the FOI Act, applicants are able to seek an internal review on the basis of eight (8) types of primary decisions made by agencies. The FOI Act does not provide a mechanism for applicants to seek an internal review based on item (a) above. I have however re-considered the searches and advise of my decision as follows.

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

14. I have decided to refuse access to documents within the scope of your request in accordance with the FOI Act section 24A which states 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.
15. I am satisfied that all reasonable steps have been taken to find information relevant to your request, having regard to:
- 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.

16. Section 24A of the FOI Act requires an agency to take 'all reasonable steps' to find a requested document before refusing access to it on the basis that it cannot be found or does not exist. Whether 'all reasonable steps' have been taken is a question of fact in the individual case to be decided having regard to matters such as the terms of an applicant's request, the document creation and retention practices in an agency, and the steps taken by the agency to identify and locate documents requested by the applicant.
17. Despite the reasonable searches undertaken, the Department has been unable to identify documents falling within the scope of your request. A description of the searches undertaken to locate the documents which you are seeking to access is at **Schedule 1**.
18. On that basis, I am refusing your request for access to the information in accordance with section 24A of the FOI Act.

Your rights of review

16. Under section 54L of the FOI Act, if you are dissatisfied with my decision, 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: 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.

17. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the Office of the Australian Information Commissioner: <http://oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-fact-sheets/foi-factsheet-12-your-review-rights>

Contacts

18. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section 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,

John (Position Number 62230915)

Information Law Officer

Information Law Section | Legal Services and Assurance Branch

Legal Assurance and Governance Division

14 November 2018



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 TRIM

I spoke with the staff member involved in the relevant FOI matter and was advised that the documents had not yet been saved into the departmental records management system (HPE Content Manager), also known as TRIM. I also undertook a search of TRIM and no documents within the scope of your request could be found. For these reasons, a TRIM audit log in relation to those identified documents do not exist.



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).

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.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
 - (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
 - (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
- (c) give to the applicant appropriate information concerning:
 - (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

- (1A) Section 13 of the Administrative Decisions (Judicial Review) Act 1977 does not apply to a decision referred to in subsection (1).
- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.
(see section 11A).