



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

Internal review decision and reasons for decision of Nick (Position Number 62209913)
Information Law Section, Legal Services and Assurance Branch, Department of Veterans' Affairs

Applicant: Verity Pane

Date of original decision: 5 November 2018

FOI reference number: FOI 25052

Internal review decision date: 6 December 2018

Internal review reference number: IR 25383

Sent by email: foi+request-4876-ecab7771@righttoknow.org.au

Dear Ms Pane

Freedom of Information Internal Review: IR 25383

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 Position Number 62212962, Legal Officer, Information Law Section, Legal Services and Assurance Branch to refuse access to documents within the scope of your request.

Authority to make this decision

3. I, Nick (Position Number 62209913), Acting Director, Information Law Section, am an officer authorised by the Secretary of the Department of Veterans' Affairs (**Department**) to review decisions about access to documents in the possession of the Department in accordance with section 54C of the FOI Act.

Summary

3. On 12 October 2018, you made a request for access to documents in the possession of the Department. Your request sought access to:

Under s 17 of the FOI Act, I seek a compiled listing from your financial management information system of all FY17/18 paymeh5s made by DVA (whether directly or indirectly) to any private investigator (also known sometimes as a private inquiry agent) entity.

4. As no extensions of time were applied to process your request, a decision on your request was due by 6 December 2018.
5. On 5 November 2018, you were provided with a decision relating to access to documents within the scope of your request. The decision to refuse you access to the requested documents was made on the grounds that the documents do not exist as provided for in section 24A of the FOI Act.
6. On 6 November 2018, you requested an internal review of the original decision.
7. As no extensions of time have been applied to process this internal review, a decision on your request is due by 6 December 2018.
8. The Department has undertaken a renewed search of its records and has been unable to identify any documents that fall within the scope of your request, as set out above. A description of the additional searches undertaken to locate the documents which you are seeking to access is at **Schedule 1**.

Decision

9. I have made a decision to affirm the original decision made by Position Number 62212962, Legal Officer, Information Law Section, Legal Services and Assurance Branch to refuse you access to any documents within the scope of your request.

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 original request, dated 12 October 2018;
 - the terms of your request for an internal review;
 - the types of documents that are in the possession of the Department;
 - the content of the documents that fall within the scope of 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 that section 24A of the FOI Act is relevant to my decision because it allows for requests being refused if documents do not exist.
- the Guidelines issued by the Office of the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**).

12. A full extract of the FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reason for decision

13. I have decided to refuse access to documents within the scope of your internal review request, in accordance with the following exemption in the FOI Act:

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.

14. In this case, a document containing information about the Department's payments for private investigators does not exist after taking reasonable steps to search for the existence of such a document.

Your rights of review

15. Under section 54L of the FOI Act, if you are dissatisfied with my decision, you may apply to the OAIC to review my decision. An application for review by the OAIC 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 2000

16. More information about your review rights under the FOI Act is available in Fact Sheet 12 published by the OAI: <http://oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-factsheets/foi-factsheet-12-your-review-rights>

Contacts

17. If you wish to discuss this decision, please contact the Information Law Section using the following details:

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

GPO Box 9998, Canberra ACT 2601

Facsimile: (02) 6289 6337

Email: information.access@dva.gov.au

Yours Sincerely,

Nick (Position Number 62209913)

Acting Director

Information Law Section | Legal Services & Assurance Branch

Legal Assurance and Governance Division

5 December 2018



Summary of document searches

The Department conducted the following searches to identify files and documents that fall within scope of your internal review 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 internal review request was circulated to relevant areas in the Department requesting that they conduct a search of their respective areas to identify whether documents relevant to the internal review request exist. No relevant documents were identified.



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:
 - a document of the agency; or
 - 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).