



14 February 2019

Our reference: 2019/472

Mr Arthur Jordan

By email: foi+request-5112-f78e3003@righttoknow.org.au

Dear Mr Jordan

Freedom of Information Request – Notice of Decision

I refer to your email of 15 January 2019, requesting an internal review of Comcare's decision dated 15 January 2019 (the primary decision) made under the *Freedom of Information Act* (1982) (FOI Act) for access to:

I seek any documents, notes or computer lists showing the number of clients who have been issued top-up hearing aids (not on the Free to Client list) and where the cost has been fully subsidized for hearing loss and/or tinnitus claims by Public Servants and/or Defence Contractors (if applicable) for the Financial Year ending 30 Jun 18.

I do not require any personal information which may be redacted, just a list of the number of people issued top-up hearing aids which are not on the Free to Client list but have had the cost fully subsidized by Comcare.

Your submission

You have written:

I do not consider that Comcare has made a thorough attempt to supply the information sought. The information sought should be very easy to find. If you were required to supply this information by a Senator before Senate Estimates, you would take the request on notice and supply the information within 28 days. Comcare also has a list of all hearing aids on the Free to Client (FTC) list. This list had been previously supplied to me via Comcare. I can provide a copy if required. A quick search via your IT systems would indicate if all hearing aids supplied are, or are not, on this list. I have been given estimates by staff members at Comcare so this information appears to be well known and/or easily found and retrieved.

It therefore appears that Comcare is easily able to comply with Section 17 and could produce a written document containing the information by using a computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information ...'

I would suggest that the following steps would easily produce the requested information:

1. Search for names of hearing aids issued during the relevant period.
2. Compare that list against the FTC list in the possession of Comcare.

3. Any hearing aids that appear on the FTC list can be ignored, leaving a very small number of the top-up hearing aids issued to Claimants.

4. This would produce the list sought by me showing the "Number of people issued top-up hearing aids not on the Free to Client (FTC) for the FY 2017-2018."

If you follow these easy steps, it will not cause any inconvenience to Comcare and will enable me to obtain the information sought. Please advise if you require me to provide you a copy of the FTC list previously provided to me by your Agency.

Summary of Decision

I have decided to affirm the primary decision to refuse access under section 24A of the FOI Act on the basis that all reasonable steps have been taken to locate the documents you have requested and I am satisfied that they cannot be located or do not exist.

I have also decided that Comcare cannot produce a document under section 17 of the FOI Act to satisfy your request.

Please see Attachment A for the reasons behind my decision.

Review rights

If you disagree with any part of the decision you can ask for a review. You can ask for an external review by the Office of the Australian Information Commissioner. See Attachment B for more information about how arrange a review.

Further assistance

If you have any questions please email foi@comcare.gov.au or phone me on the number below.

Yours sincerely

Elizabeth
FOI Officer

REASONS FOR DECISION

The reasons for my decision are discussed below.

Information Considered

In reaching my decision I have considered:

- your original request dated 19 November 2018
- your internal review request of 15 January 2019
- the documents that fall within the scope of your request
- consultations with Comcare officers about:
 - the nature of the documents
 - Comcare's operating environment and functions
- guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the **Guidelines**)
- the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 54C of the FOI Act. I did not make the original decision in relation to your request. I have reviewed the original decision and made a fresh decision on your request.

Your request for internal review indicated that you consider that a quick search via IT systems would indicate if all hearing aids supplied are, or are not, on this list. You state that this information appears to be well known and easily found/retrieved. You have provided step-by-step instructions on how your request could be finalised.

Section 24A of the FOI Act

Section 24A of the 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.

The Claims Management Team (Team) conducted searches of their electronic records, including shared drives and emails. The Team did not identify any documents matching the description in your request. I undertook further consultations with the Branch and was informed that there are no documents that fall within the scope of this part of your request.

The Claims Management team advised that free to client services are encouraged and some employees choose this option. Those that still request other models of hearing aids may have these reimbursed based on quotations provided by the employee on a case by case basis. In some cases, Comcare will pay for other models. However, this data is unable to be captured from our system.

On the basis of these searches, I am satisfied that in accordance with section 24A of the FOI Act:

1. all reasonable steps have been taken to find the documents; and
2. the documents do not exist.

Section 17 of the FOI Act

Section 17 of the FOI Act relevantly provides that:

(1) Where:

(a) a request ... is made in accordance with the requirements of subsection 15(2) to an agency;

...

(c) the agency could produce a written document containing the information in discrete form by:

(i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or

(ii) the making of a transcript from a sound recording held in the agency;

The agency shall deal with the request as if it were requested for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

Paragraph 3.185 of the Guidelines provides:

'...the reference in s 17(1)(c)(i) to a 'computer or other equipment that is ordinarily available' means 'a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available ... [T]he computer or other equipment ... must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.'

The Technology Team has clarified that the data you have requested is not held in a way that would allow it to be collated into a document and presented at the level of detail that you seek. The Technology Team attempted to retrieve information based on payments made in relation to hearing aids. However, the Technology Team were unable to create a document that indicated whether a purchased hearing aid was on the Free to Client list.

I have been advised that to carry out your request, staff would need to manually review each electronic case individually. This involves a number of steps including:

1. Review each claim number listed on the spreadsheet of hearing aid payments made. The spreadsheet does not have the make or model of the hearing aid, only who the provider was, for example Australian Hearing Services or Audio Clinic.
2. The electronic claim file would need to be opened to find the original copy of the invoice and then someone would need to check the make and model of the hearing aid purchased.
3. These details would need to be manually extracted and then compared to the list of top-up hearing aids to see if that model was on the top-up list.

The decision of the Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation* [2012] FCA 720 [Collection Point] (affirmed by the Full Court of the Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67) makes clear that where manual input is required to produce a written document, then a computer is not being used in a manner that is 'ordinarily available' to the agency because of the extraordinary step that is required to be taken. In considering the obligations of the Australian Taxation Office (ATO), the Court held [at 44]:

Section 17(1)(c)(i) is directed at ensuring that an agency will not be obliged to produce a document unless the effective and comprehensive means of doing so are ordinarily available to it for the specified purpose. In that context, the computer or other equipment ordinarily available for the specified purpose must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.

In applying the reasoning in *Collection Point* I am therefore satisfied that Comcare cannot produce a document containing data relevant to your request, as to do so Comcare would be required to manually search, collate and compare data that is individually stored in individual files. There is no functioning computer that can operate independently to produce a document to satisfy your request.

Based on the above, I am satisfied that section 17 of the FOI Act does not apply to your request, as Comcare cannot use an ordinarily available computer system to produce a written document containing the information you have requested.

Conclusion

I have decided to affirm the original decision to refuse your request under section 24A of the FOI Act as no document matching the terms of your request exists and I am satisfied that section 17 of the FOI Act does not apply to your request.

INFORMATION ON RIGHTS OF REVIEW

FREEDOM OF INFORMATION ACT 1982

Application for review of decision

The *Freedom of Information Act 1982* (FOI Act) gives you the right to apply for a review of this decision. Under section 54L of the FOI Act, you can apply for a review of this decision by:

- (i) an internal review officer within Comcare; or
- (ii) the Information Commissioner.

Information Commissioner review

You must apply in writing within 60 days of the receipt of the decision letter and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 5218, Sydney NSW 2001
Email: enquiries@oaic.gov.au

If a person has sought an internal review and no result of that review is provided within 30 days, then the applicant may apply to the Information Commissioner to review the matter.

An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Complaints to the Information Commissioner or the Commonwealth Ombudsman

You may complain to either the Commonwealth Ombudsman or the Australian Information Commissioner about action taken by Comcare in relation to your request. The Ombudsman will consult with the Australian Information Commissioner before investigating a complaint about the handling of an FOI request.

Your enquiries to the Ombudsman can be directed to:

Phone: 1300 362 072 (local call charge)
Email: ombudsman@ombudsman.gov.au

Your enquiries to the Australian Information Commissioner can be directed to:

Phone: 1300 363 992 (local call charge)
Email: enquiries@oaic.gov.au

No particular form is required to make a complaint to the Ombudsman or the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify Comcare as the relevant agency.