



Australian Government

Office of the Australian Information Commissioner

Our reference: FOIREQ19/00041

O Wendell

By email: foi+request-5260-da701b49@righttoknow.org.au

Your Freedom of Information request – FOIREQ19/00041

Dear O Wendell

I refer to your request for access to documents made under the *Freedom of Information Act 1982* (Cth) (the FOI Act) and received by the Office of the Australian Information Commissioner (OAIC) on 15 February 2019.

You requested access to:

Under the FOI Act, and noting the OAIC's role in providing best practice Privacy Act compliance for all Cth agencies, I seek a copy of the OAIC's contract with Hotjar.

Decision

I am an officer authorised under s 23(1) of the FOI Act to make decisions in relation to FOI requests.

I have decided to refuse your request for documents under s 24A of the FOI Act on the basis that all reasonable steps have been taken to find the documents you requested, but no such documents are held by the OAIC. This is because the OAIC uses Hotjar pursuant to a subscription service, which operates according to terms of services found on Hotjar's webpage.

Reasons for decision

Material taken into account

In making my decision, I have had regard to the following:

- your freedom of information request of 15 February 2019
- the FOI Act, in particular s 24A
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the FOI Guidelines), specifically [3.85]-[3.91]

- searches conducted by relevant OAIC staff

Documents cannot be found or do not exist – s 24A

I have refused your request under s 24A(1) of the FOI Act on the basis that all reasonable steps have been taken to find the documents you requested and no such documents held by the OAIC exist.

Section 24A(1) provides as follows:

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.

Searches undertaken

The FOI Guidelines state at [3.89]:

Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.

At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents
- the record management systems in place
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and
- the age of the documents.

To find the document you requested, the Director Corporate Services and the Director Strategic Communications and Coordination conducted searches of the OAIC's file management system. No documents within the scope of your request were found.

As already noted, the OAIC utilises Hotjar on a subscription basis. The Terms of Service for users of Hotjar constitutes Hotjar's mutual agreement with all of its users. The OAIC does

not hold a record of any agreement with Hotjar, including the Terms of Service which can be found on Hotjar's website at <https://www.hotjar.com/legal/policies/terms-of-service>.

Conclusion

I am satisfied that all reasonable steps have been taken to find the documents you requested and that the OAIC does not hold documents that fall within the scope of your request. As I have already advised, Hotjar's Terms of Service, can be found on its website under 'Policies'. As a result, I have decided to refuse your request under s 24A of the FOI Act on the basis that no documents held by the OAIC exist.

Your review rights are outlined on the following page.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Megan McKenna', with a stylized flourish at the end.

Megan McKenna

FOI Officer
Legal Services

18 March 2019

If you disagree with my decision

Internal review

You have the right to apply for an internal review of my decision under Part VI of the FOI Act. An internal review will be conducted, to the extent possible, by an officer of the OAIC who was not involved in or consulted in the making of my decision. If you wish to apply for an internal review, you must do so in writing within 30 days. There is no application fee for internal review.

If you wish to apply for an internal review, please mark your application for the attention of the FOI Coordinator and state the grounds on which you consider that my decision should be reviewed.

Further Review

You have the right to seek review of this decision by the Information Commissioner and the Administrative Appeals Tribunal (AAT).

You may apply to the Information Commissioner for a review of my decision (IC review). If you wish to apply for IC review, you must do so in writing within 60 days. Your application must provide an address (which can be an email address or fax number) that we can send notices to, and include a copy of this letter. A request for IC review can be made in relation to my decision, or an internal review decision.

It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC. For this reason, if you make an application for IC review of my decision, and the Information Commissioner is satisfied that in the interests of administration of the Act it is desirable that my decision be considered by the AAT, the Information Commissioner may decide not to undertake an IC review.

Section 57A of the FOI Act provides that, before you can apply to the AAT for review of an FOI decision, you must first have applied for IC review.

Applications for internal review or IC review can be submitted to:

Office of the Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Alternatively, you can submit your application by email to foi@oaic.gov.au, or by fax on 02 9284 9666.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the [Access our information](#) page on our website.