



14 April 2014

Mr Ben Fairless
Right to Know

By email: foi+request-551-eb3ef5fd@righttoknow.org.au

Dear Mr Fairless

**Decision on internal review under the Freedom of Information Act 1982
– documents that contain references to the decision by IP Australia to refuse to accept
Freedom of Information requests via email**

1. I refer to your email dated, and received by IP Australia on, 19 March 2014 requesting internal review of Ms Mandy Edlington's access refusal decision of the same date.
2. I am an officer authorised under section 23(1) of *Freedom of Information Act 1982 (FOI Act)* to make decisions on internal review. I confirm that I had no involvement with Ms Edlington's primary decision; and, I declare that I have no conflict of interest in relation to this matter.
3. In your original application dated 3 March 2014, you requested access to:

... documents that contain references to the decision by IP Australia to refuse to accept Freedom of Information requests via email.
4. You specifically excluded, from the scope of your request, "documents that have been sent to members of the public in relation to their FOI requests".
5. This letter sets out my decision in relation to your request for internal review. It comprises a fresh decision on your original application under the FOI Act.

My decision

6. I have decided to affirm the decision of the primary decision maker.
7. I agree with Ms Edlington's assessment that all reasonable steps have been taken by IP Australia to identify and locate the documents to which you sought access. I am satisfied that the documents you requested do not exist.
8. Consequently, I am refusing your request for access to a document under section 24A(1) of the FOI Act.

Sufficiency of searches and consultation

9. I have considered the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982 (Guidelines)* in the course of making my decision on internal review.

10. As you are aware from the primary decision notice, the Guidelines relevantly provide, at paragraph 3.54 (footnotes omitted), that:

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 environment. At a minimum, an agency ... should take comprehensive steps to locate a document 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 the agency who may be able to assist with the location of documents; and*
- *the age of documents.*

11. In addition, and as the Guidelines relevantly provide at paragraph 8.40, an agency can refuse a request for access to a document under section 24A(1) of the FOI Act if the agency can show that it has taken all reasonable steps to locate the document and has determined that the document cannot be found or does not exist.

12. In undertaking my review, I may rely on the record of searches undertaken at the primary decision stage; or, I may cause the same work to be undertaken again (refer, paragraph 9.33 of the Guidelines).

13. I have reviewed the file associated with the management of your original application. I have also examined the approach of the primary decision maker with respect to the identification of any relevant documents.

14. Following my review of the file and examination of the primary decision maker's approach; and, after considering your reasons for seeking internal review (discussed later), I have no cause not to rely upon the earlier agency searches and the primary decision maker's approach. I do not have any doubt as to the adequacy of what was undertaken for the purposes of the primary decision.

15. In being satisfied with the approach adopted for the primary decision, I note that the following steps were undertaken by IP Australia to identify and locate any documents relevant to your request:

- *consultation with relevant officers of Change Management in the Customer Operations Group of IP Australia, with responsibility for managing transaction channels (including email) and instituting eServices across IP Australia;*
- *electronic searches of relevant files and folders for relevant documents, using IP Australia's electronic records management system, Objective;*
- *electronic searches of relevant files and folders for relevant documents, on shared document drives; and*
- *electronic searches of personal drives and email accounts of relevant officers.*

16. I understand from the primary decision notice that Ms Edlington relied on the consultation and electronic searches outlined above to identify any documents relevant to your request. I have similarly relied on the advice from the relevant officers concerned that the searches conducted in relation to your request did not produce any results for the documents in question; and, I note that none became apparent during the course of my internal review.
17. For these reasons, I agree with the primary decision maker's conclusion that there are no documents of this agency containing references to a decision by IP Australia to refuse to accept Freedom of Information requests via email. I am satisfied that there are no documents in the possession of IP Australia relating to your request.

Your reasons

18. In your request for internal review, you provided reasons for seeking such review. In this respect I note that I have considered all issues raised in your request for internal review. Those reasons appear below (in an unedited form, and without correction as to spelling or other errors):

1 - In conversations with employees at IP Australia, employees have alluded to documents regarding the decision by IP Australia to refuse to accept FOI requests via email. This would include legal advice, that I would find difficult to believe that the decision maker (Ms. Edlington) would be unaware of as the Chief Legal Officer.

2 - I would refer IP Australia to an email sent by the Director of Trade Marks & Designs Administration ("The Director") to contact@righttoknow.org.au on the 4th of March.

This email is a request to remove the name of a IP Australia employee (Daniel Rehwinkel) from a different Right to Know request, as Mr. Rehwinkel authored an email to another Right to Know user which referenced the decision by IP Australia to not accept requests via email.

*Whilst the original email by Mr. Rehwinkel would be exempt, the email from The Director would be valid, as it discusses the decision and is not a request to a member of the public regarding ****their**** FOI request.*

In case you are not aware, Right to Know does not make requests, it simply allows requests to be made by users. If you were to say that Right to Know was making an FOI request, it would be like saying that iiNet is making requests when I email from my iiNet email address, or Gmail is making FOI requests when a request is sent from a Gmail email address.

3 - I made a phone call to IP Australia to discuss IP Australia's obligations under the FOI act. I spoke with Mr. Rehwinkel who advised that he would need to seek further advice from senior employees within IP Australia. I find it hard to believe that there is not a single paper trail in relation to that phone call.

4 - To assume there is no records of an approved change to update IP Australia's website to reflect the use of eServices over email sounds ridiculous. Surely there is a change in the relevant IT Systems used by IP Australia?

5 - I find it hard to believe that documents are not held by the Office of Legal Counsel in relation to the change from accepting FOI requests via email. Whilst those documents may be exempt, their existence should still be acknowledged.

19. Essentially, you have questioned the existence of certain documents in the possession of IP Australia; and, queried their absence from the notice of the primary decision maker. You have suggested, in sections 1 and 5 of your reasons, that there are documents in the possession of IP Australia relating to your request, including legal advice, which have been withheld by the primary decision maker.
20. I am not in a position to respond to the proposition that “[unnamed] employees at IP Australia” have “alluded to documents ...”. I find that proposition is unfortunately too unspecific to do so. In any case, the proposition that IP Australia is in possession of documents relevant to your request is unfounded.
21. The documents the subject of your original application are those in existence at the time that application was made. Following *Re Edelsten and Australian Federal Police* [1985] AATA 350, you cannot now insist that your request cover documents created after your original application was received.
22. On this basis, I am satisfied that there are no documents relevant to your request, including documents containing legal advice “in relation to the change from accepting FOI requests via email”. In particular, in your reasons at section 2, you specifically referenced an email from the Director of Trade Marks & Designs Administration dated 4 March 2014.
23. I have examined that email; and, it note that it was sent a full day after your original application. In any case, the email went to the matter of disclosing an officer of IP Australia’s personal information; to which I do not believe you have responded. Even if the email had been sent before your original application, I consider it unlikely that it would necessarily be taken to be subject to that application.
24. I think it perhaps unlikely that the words: “This person is simply an employee carrying out the actions that were set by IP Australia” constitute that email as a document “that contain[s] references to the decision by IP Australia to refuse to accept Freedom of Information requests via email”. I do not, however, have to decide that question as that document was produced after your original application.
25. In section 3 of your reasons, you referenced a telephone conversation between yourself and an officer of IP Australia. I have received advice from the officer in question that there were two telephone conversations conducted between yourselves over of the course of two consecutive days.
26. The first was conducted on Monday, 3 March 2014, in which I understand you discussed the submission of an FOI request, via email, of another member of the public. Mr Rehwinkel has advised that his recollection of that conversation is that you questioned IP Australia’s approach, and that he replied that he would seek the advice of other officers before responding to you, generally regarding the submission and receipt of FOI requests via email.
27. The second was a conversation on Tuesday, 4 March 2014 that Mr Rehwinkel initiated in response to the conversation of the preceding day. This conversation was conducted following the receipt of your FOI request on Monday, 3 March 2014, regarding “the decision by IP Australia to refuse to accept Freedom of Information requests via email”. During that conversation, Mr Rehwinkel recalled that he confirmed that your feedback had been taken into account, and for this reason, IP Australia would agree to process your request in the absence of its submission via eServices.
28. Mr Rehwinkel has confirmed that no file note was made by him of either conversation. In any case, as mentioned above, any file note made after your original application had been submitted would not be considered to be subject to your application.

29. In section 4 of your reasons, you contend that there must be documents evidencing a change in the relevant IT systems used by IP Australia. Any such documents, in my view, would not “contain references to the decision of IP Australia to refuse to accept Freedom of Information requests via email”; although, they could go to evidence the technical implementation of any such decision.

30. I appreciate that you are frustrated with the decision that no documents exist with respect to the subject-matter of your original application. However, the right of access to documents under the FOI Act is to existing documents, at the time the original application was made, rather than to information, per se.

31. As is observed in paragraph 3.12 of the Guidelines: “The FOI Act does not require an agency ... to create a new document in response to a request for access, except in limited circumstances”. I do not believe that those circumstances exist here.

Your right to complain and your review rights

32. If you have any concerns regarding the way in which IP Australia has managed your original application for access or this request for internal review, it is open to you to make a complaint to the Office of the Australian Information Commissioner or the Commonwealth Ombudsman – the details for which appear in the enclosure to this letter.

33. I have enclosed a notice in respect of review rights for your information.

Yours sincerely

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

Philip Harrison
Chief Legal Counsel
IP Australia

YOUR RIGHTS TO SEEK REVIEW OF A DECISION ON INTERNAL REVIEW MADE UNDER THE FREEDOM OF INFORMATION ACT 1982 (FOI ACT)

If you do not agree with this decision, you may choose to exercise your review rights by applying to the Office of the Australian Information Commissioner (**OAIC**) for a review of this decision.

If you are dissatisfied with the decision of the Australian Information Commissioner (**Information Commissioner**), you may apply to the Administrative Appeals Tribunal (**AAT**) for a review of that decision.

Review of decision by the Information Commissioner

The Information Commissioner is an independent office holder who is authorised to review decisions of agencies and ministers made under the FOI Act.

You have the right to apply to the Information Commissioner for review of this decision on internal review. There is no cost associated with making an application for review by the Information Commissioner.

If you are requesting a review of a decision to refuse access to documents, to impose a charge or to refuse to amend a document, you must make an application in writing to the Commissioner, within 60 days of being notified of the decision.

If you are objecting to a decision to grant access to a document, you must make an application in writing, to the Commissioner, within 30 days of being notified of the decision.

An application for review by the Commissioner can be lodged online, via email, facsimile, post or in person. An application for review by the Commissioner should be directed to:

Office of the Australian Information Commissioner
GPO Box 2999
CANBERRA ACT 2601
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au

Or in person to: Level 3, 175 Pitt Street, SYDNEY NSW 2000.

An application form for a review by the Commissioner is available from the OAIC website (www.oaic.gov.au). Your application should include a copy of the decision to which your application relates. You should also set out the reasons why you disagree with the decision.

After reviewing a decision, the Commissioner must do one of the following:

- set aside the decision and substitute his own decision for that of the decision under review;
- affirm the decision; or
- vary the decision.

Please advise IP Australia if you make an application for review by the Commissioner, preferably by email (FOI@ipaustalia.gov.au).

Review of decision by the Administrative Appeals Tribunal (AAT)

The AAT is an independent body authorised to review certain decisions on their merits and, where the AAT decides it is appropriate, to substitute its own decision for that of the decision under review.

If you are dissatisfied with the decision of the Information Commissioner, you are entitled to make an application to the AAT for a review of that decision. An application for review must be in writing and lodged within 28 days of being notified of the Commissioner's decision. If you have good reason for not meeting this timeframe, you can write to the AAT and request an extension of time in which to lodge your application. Your request for an extension should set out the reasons why the application was not made within the 28 day period.

Information about making an application to the AAT, and the process for requesting a reduction to the application fee, is available from the AAT's website (www.aat.gov.au).

An application to the AAT for a review of the Commissioner's decision should be directed to:

Administrative Appeals Tribunal
GPO Box 9955
(in your capital city)

Please advise IP Australia if you make an application for review by the AAT, preferably by email (FOI@ipaustalia.gov.au).

Complaints to the Commissioner or Ombudsman

You can also make a complaint to the Commissioner or the Commonwealth Ombudsman, if you have concerns about action taken by IP Australia in relation to a request under the FOI Act. Any correspondence or enquiries should be directed to:

Office of the Australian Information Commissioner
GPO Box 2999
CANBERRA ACT 2601
Email: enquiries@oaic.gov.au

Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601
Email: ombudsman@ombudsman.gov.au