



## Decision and Statement of Reasons made under the *Freedom of Information Act 1982*

Decision and reason for decision of Jo, 62210326, Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

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**Applicant:** The National Advocate

**Decision date:** 7 November 2019

**FOI reference number:** FOI 31280

**Sent by email:** foi+request-5686-52b92bb8@righttoknow.org.au

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Dear The National Advocate,

### **Freedom of Information Request: FOI 31280**

#### **Decision**

1. The Department of Veterans' Affairs (**Department**) has undertaken a reasonable search of its records and has not been able to identify documents relevant to your request.
2. For this reason, I have made a decision to refuse your request under section 24A of the *Freedom of Information Act 1982* (**FOI Act**), as the documents are not in the possession of the Department.

#### **Authority to make this decision**

1. I, Jo (Position Number 62210326), Assistant Director, Information Law Section, am an officer authorised by the Secretary of the Department to make decisions about access to documents in the possession of the Department, in accordance with section 23(1) of the FOI Act.

## Summary

2. On 2 October 2019, you made a request for access to documents in the possession of the Department. Your request sought access to:

*Can you please provide the Minister's diary covering all days in September in 'weekly agenda' format.*

3. As no extensions of time have been applied to process your request, a decision on your request was due by 1 November 2019.
4. In accordance with section 15AC of the FOI Act, the principal officer of the Department is taken to have made a decision personally refusing to give access to the documents on the last day of the initial decision period. Even where a decision has not been issued within the prescribed timeframe, the Department retains an obligation to process and finalise the FOI request.
5. I would like to apologise for the delay in acknowledging receipt of your request and issuing this decision to you and any inconvenience it may have caused.

## Material taken into account

3. In accordance with section 26(1)(a) of the FOI Act, my findings on any material question of fact, the material on which those findings were based and the reasons for my decision to refuse access to the documents follows.
4. I have taken the following material into account in making my decision:
  - the terms of your request
  - 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 of the FOI Act (Requests may be refused if documents cannot be found, do not exist or have not been received) relevant to my decision and
  - the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (FOI Guidelines).
5. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 1**.

## Reasons for decision

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

6. Section 24A(1) of the FOI Act provides 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 is satisfied that the document:
    - (i) is in the agency's possession but cannot be found; or
    - (ii) does not exist.
7. I am satisfied that all reasonable steps have been taken to find information relevant to your request, having regard to:
- the terms of your request
  - the subject matter of the documents
  - the current and past file management systems and the practice of orderly destruction or removal of documents and
  - the Department's record management systems and practices.
8. The Minister's diary is a document held by the Minister's office and is not in the possession of the Department, or a document that the Department has access to. For this reason, the Department has been unable to locate any documents falling within the scope of your request.
9. If you would like to request a copy of the Minister's diary, you may wish to submit an FOI request to the Minister's Office directly. The Minister's Office can be contacted at:

**Post:** PO Box 6022  
House of Representatives  
Parliament House  
Canberra ACT 2600

**Email:** [minister@dva.gov.au](mailto:minister@dva.gov.au)

10. For these reasons, I am refusing your request for access to documents as described in your request in accordance with section 24A of the FOI Act.

### Your rights of review

6. If you are dissatisfied with my decision you may apply for Information Commissioner Review of the decision through the Office of the Australian Information Commissioner (**OAIC**). In accordance with section 54E(b) of the FOI Act, Internal Review is not available as the Department did not finalise your FOI request within the prescribed statutory timeframe.

### OAIC review

7. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by 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](http://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](mailto:enquiries@oaic.gov.au)

**In person:** Level 3, 175 Pitt Street, Sydney NSW 2000

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

### Contact us

9. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section using the following details:

**Post:** Legal Services and Audit Branch  
Department of Veterans' Affairs  
GPO Box 9998, Canberra ACT 2601

**Facsimile:** (02) 6289 6337

**Email:** [Information.Law@dva.gov.au](mailto:Information.Law@dva.gov.au)

Yours sincerely,

**Jo (Position Number 62210326)**

Assistant Director

Information Law Section | Legal Services and Audit Branch

7 November 2019



## Schedule of relevant provisions in the FOI Act

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### 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).