



16 September 2020

JS

**BY EMAIL:** [foi+request-5971-81b06e2e@righttoknow.org.au](mailto:foi+request-5971-81b06e2e@righttoknow.org.au)

**In reply please quote:**

FOI Request: FA 19/12/00430-R1

File Number: OBJ2019/61396

Dear JS

**Decision on Internal Review – Freedom of Information Act 1982**

I refer to your correspondence dated 19 August 2020 in which you request that the Department of Home Affairs (the Department) review its decision on access to documents dated 30 June 2020 under the *Freedom of Information Act 1982* (the FOI Act).

**1 Scope of original request**

The scope of your original request for access to documents under the FOI Act was as follows:

*A document that sets out the following information for each entry in the Disclosure log from 1 Jan 2018 to date of this request for access:*

- (a) *Date document(s) provided to FOI Applicant*
- (b) *Reference No*
- (c) *Title*
- (d) *Date information about each release was published in the disclosure log as required by law.*

**2 Original Decision on access dated 30 June 2020**

The Department identified 53 documents as falling within the scope of your original request. These documents were in the possession of Department on 3 December 2019 when your FOI request was received.

The original decision maker decided to:

- Release 53 documents in full.

**3 Request for Internal Review**

On 19 August 2020, you requested the Department to review its decision dated 30 June 2020. In your request, you stated:

*'Thank you for providing access to the documents (redacted). I seek an internal review of the decision.*

*On 3 December 2019 I sought access to a document that sets out the following information for each entry in the Disclosure log from 1 Jan 2018 to date of the request for access:*

*(a) Date document(s) provided to FOI Applicant*

*(b) Reference No*

*(c) Title*

*(d) Date information about each release was published in the disclosure log as required by law.*

*The Department decided not to consider (a), (b), and (c) of my request because the information was located in the disclosure logs published on the Department's website. Thus, the Department decided to limit my request to (d): Date information about each release was published in the disclosure log as required by law.*

*The Department identified 53 documents as falling within the scope of the request at (d). These documents were in the possession of the Department on 3 December 2019 when my request was received. The decision in relation to the documents in the possession of the Department which fall within the scope of the request was to release relevant information in 53 documents in full. (Documents 3 and 4 appear to be duplicate).*

*On 30 June 2020 the Department provided access to documents comprising of a series of emails from Web Services to (redacted) about upload requests to the Disclosure Log. The emails contained commentary such as, pages now live, this has now been published, your updated content now live, request has been actioned.*

*I seek an internal review of the decision. First, the decision not to progress (a), (b) and (c) of the request because the information was available elsewhere ignores the reality of the right of access under the FOI Act is to documents, rather than to information. Moreover, the information that is available on the website is incomplete, not in accordance with the FOI Act and lacking in certainty.*

*On its website the Departments states that the information shown in this disclosure log is information to which we gave access in response to a request under section 11A of the Freedom of Information Act 1982 (FOI Act). The public have a right to assume a Commonwealth Department is complying with its legal obligations – particularly obligations passed by Federal Parliament. Regrettably, a misguided belief in so far as this Department is concerned.*

*The released emails reveal a system to upload documents to the Disclosure Log being implemented at the administrative convenience of the Department with no apparent effort made to ensure that the Department complied with the law. It is a challenge to identify instances where the Department complies with the law. No such challenge to identify instances of the Department failing to comply with the law. Some examples, the released emails reveal that between late December 2019 and 27 Feb 2020 more than 100 new items were logged in the 2019 Disclosure Log. In that brief period at least 100 entries reflecting failure by the Department to comply with the law. A few other examples:*

*On 5 Jan 2016 the Department granted access to documents under FOI. The release was not reflected in the Disclosure Log until 2 Feb 2018.*

*On 19 Aug 2016 the Department granted access to documents under FOI. The release was not reflected in the Disclosure Log until 2 Feb 2018.*

*On 18 Dec 2017 the Department granted access to documents under FOI. The release was not reflected in the Disclosure Log until 2 Feb 2018.*

*On 25 Sept 2018 the Department granted access to documents under FOI. The release was not reflected in the Disclosure Log until September 2019.*

*On 3 Apr 2018 the Department granted access to documents under FOI. The release was not reflected in the disclosure log until 3 Aug 2018 and then only after someone within the Department made a request for an urgent to the log. Given the nature of the documents released in April one is left to ponder whether the public controversy involving the Minister Dutton and the grant of visas for au pairs had a bearing on the “urgency” in August.*

*On 16 August 2018 the Department granted access to documents under FOI. The release was not reflected in the disclosure log until 23 October 2018 – or so it seems in the disclosed documents. In August 2019 the Minister caused documents to be produced to the Senate. Included in the documents is the following:*

*A copy of the Paladin Holdings PTE Ltd PNG Services Contract (which only removed commercial in confidence information), was made available on 16 August 2018 in the FOI disclosure log on the Department’s website, which is available to the public.*

*One is left to ponder the trustworthiness of the emails as to the date information was uploaded to the disclosure log (i.e 23 Oct ) against the trustworthiness of the information in the documents produced to the Senate (i.e 16 Aug).*

*Second, under the Public Service Act the responsibilities of the Secretary of a Department include implementing measures directed at ensuring that the Department complies with the law e.g. the Department must publish information in a disclosure log within ten working days after the FOI applicant was ‘given access’ to a document. The Code of Conduct for the Australian Public Service requires that an employee must act with care and diligence in connection with APS employment.*

*At Senate Estimates on 21 Oct the Secretary, Mike Pezzullo, noted that there are mandatory steps under the legislation that obviously have to be adhered to. At Senate hearings on 15 November 2019 the following exchange took place:*

*Senator URQUHART: Do you make a point of being regularly briefed on the issues around the performance of the department under freedom of information or is it only in relation to when you have a hearing or Senate estimates?*

*Mr Pezzullo: Both, and they’re somewhat connected because estimates is regular enough that it’s a great checkpoint in which to update yourself on management performance. In any event, separately we have management dashboards and other reports available.*

*That being the case it is highly likely that the Department records the publication date so as to ensure compliance with the FOI legislation. There is no indication the Department considered it could produce a document containing all of the information by using a ‘computer or other equipment that is ordinarily available’ to the agency for retrieving or collating stored information.*

*Third, on 25 October 2019 the Office of the Australian Information Commissioner (OAIC) opened an investigation into the Department of Home Affairs’ compliance with the Freedom of Information Act 1982 in processing requests for non-personal*

*information. The Disclosure Log relates to non-personal information and any investigation would encompass compliance by the Department with the law on disclosure. One would expect the Department to make available or the OAIC to request a document containing the information I sought in the FOI application'.*

I have interpreted this submission as a request to review:

- The scope of the original decision
- The original decision relating to parts (a) – (c) of your request
- Whether any further documents could be located and/or produced by the Department to address part (d) of your request.

#### **4 Authority to make decision**

I am an officer authorised under section 23 of the FOI Act to make decisions in respect of requests to access documents or to amend or annotate departmental records.

In accordance with section 54C(3) of the FOI Act, I have made a fresh decision on your FOI request.

#### **5 Information considered**

In reaching my decision, I have considered the following:

- the scope of your request
- the Department's original decision of 30 June 2020 and the evidence gathered for that decision
- your submissions in relation to your reasons for requesting an internal review
- the documents falling within the scope of your request
- advice from departmental officers with responsibility for matters relating to the information to which you sought access
- the FOI Act, and
- the Australian Information Commissioner's guidelines relating to the interpretation, operation and administration of the FOI Act (the FOI guidelines).

#### **6 Internal Review Decision**

I have decided to set aside the original decision and substitute a new decision to:

- Refuse access to parts (a) – (c) of your request on the basis that this information is 'material maintained for reference purposes that is otherwise publically available', as per Section 4 of the FOI Act.
- Affirm the original decision to release 53 documents in full with section 22(1)(a)(ii).
- Refuse access to a document stating 'Date information about each release was published in the disclosure log as required by law' under Section 24A of the FOI Act.

## 7 Reasons for Internal Review Decision

I have reviewed the documents that fall within the scope of this request and I have considered the submissions made by you in relation to your reasons for requesting an Internal Review.

The Department has undertaken additional reasonable searches for documents within the scope of your request. This has included consulting with the section within the Department responsible to managing the Disclosure Log about its processes and the availability of any further documents.

My reasoning in relation to the application of each section to particular documents is set out below.

### 7.1 Section 4 of the FOI Act – definition of a document

Section 4 of the FOI Act sets down that a document is:

- (a) *any of, or any part of any of, the following things:*
  - (i) *any paper or other material on which there is writing;*
  - (ii) *a map, plan, drawing or photograph;*
  - (iii) *any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;*
  - (iv) *any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;*
  - (v) *any article on which information has been stored or recorded, either mechanically or electronically;*
  - (vi) *any other record of information; or*
- (b) *any copy, reproduction or duplicate of such a thing; or*
- (c) *any part of such a copy, reproduction or duplicate;*
  - but does not include:*
- (d) **material maintained for reference purposes that is otherwise publicly available; or**
- (e) *Cabinet notebooks.*

Having reviewed your request and the Department's Disclosure Log, I am satisfied that parts (a) – (c) of your request refer to information that is publically available via the following website: <https://www.homeaffairs.gov.au/access-and-accountability/freedom-of-information/disclosure-logs>

Section 4 of the FOI Act provides that 'material maintained for reference purposes that is otherwise publically available' is not a document under the Act. I note that the information

you are seeking is published on the Department's website, thereby attracting Section 4 of the Act.

The Department has undertaken reasonable searches in relation to the documents you have requested access to. The information you have requested is available publically and as such the Department and has not located a document, for the purposes of the Act.

## **7.2 Section 22 of the FOI Act – irrelevant to request**

I have reviewed the application of section 22 deletions applied to the 53 documents in scope of the original decision.

Section 22 of the FOI Act provides that if giving access to a document would disclose information that would reasonably be regarded as irrelevant to the request, it is possible for the Department to prepare an edited copy of the document, modified by deletions, ensuring that the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request.

On 9 December 2019, the Department advised you that its policy is to exclude the personal details of officers not in the Senior Executive Service (SES), as well as the mobile and work telephone numbers of SES staff, contained in documents that fall within scope of an FOI request.

I have decided that parts of documents marked 's22(1)(a)(ii)' would disclose information that could reasonably be regarded as irrelevant to your request. I have prepared an edited copy of the documents, with the irrelevant material deleted pursuant to section 22(1)(a)(ii) of the FOI Act. The remainder of the documents have been released to you as they are relevant to your request.

## **7.3 Section 24A of the FOI Act – documents that cannot be found, do not exist or have not been received**

You have requested access to the 'date information about each release was published in the disclosure log as required by law'.

I have consulted the section with the Department's FOI team with responsibility for the Disclosure Log. On 2 September 2020, I received advice that the documents released to you reflect a manual process undertaken within the Department to arrange for publication of the Disclosure Log.

In this process "sets of released information, titled with an unformatted version of the references numbers, are compiled in batches within the FOI section, and sent to the Web Services team for content update and document upload on the disclosure pages of the Home Affairs website". The documents released to you in the original decision evidence this process.

On 15 September 2020, I further clarified that the information you request to meet part (d) of your FOI access request does not exist in discrete form, but may be held on the Department's computer systems. I have therefore considered whether section 17 of the FOI Act applies to your request.

## 17 Requests involving use of computers etc.

- (1) *Where:*
- (a) *a request (including a request in relation to which a practical refusal reason exists) is made in accordance with the requirements of subsection 15(2) to an agency;*
    - (b) *it appears from the request that the desire of the applicant is for information that is not available in discrete form in written documents of the agency; and*
    - (ba) *it does not appear from the request that the applicant wishes to be provided with a computer tape or computer disk on which the information is recorded; and*
  - (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 a request 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.*
- (2) *An agency is not required to comply with subsection (1) if compliance would substantially and unreasonably divert the resources of the agency from its other operations.*

I have considered whether Section 17(1)(c)(i) of the FOI Act is relevant to your access request, and am guided on this point by relevant case law.

Paragraph 3.207 of the FOI Guidelines, citing the decision of the Full Federal Court in *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67; 95 ATR 334, in which the Full Federal Court:

*...held that 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.' This will be a question of fact in the individual case, and may require consideration of 'the agency's ordinary or usual conduct and operations'. For example, new software may be ordinarily available to an agency that routinely commissions or otherwise obtains such software, but not to an agency that does not routinely do such things.*

In the earlier decision of the Federal Court in *Collection Point*, the Court found that:

*If a new computer program is required to be written to produce the document then a computer is not being used in a manner that is ordinarily available to the agency because an extraordinary step is required to be taken.*

Both decisions confirmed the earlier view of the Administrative Appeals Tribunal that:

*The documents requested by Collection Point were not capable of being produced by the ATO by the use of a computer, being a use that is ordinarily available to the ATO for retrieving and collating stored information. Instead, to*

*answer the request, the ATO would have been required to use a computer in an extraordinary manner, as compared to the ordinary processes available for the retrieval and collation of such material.*

The relevant Departmental business area has confirmed that information you wish to access is not available via ordinary use of the Department's computer systems. The business area further instructs that it would need to take an extraordinary step to access and/or produced a document containing this information, that is, it would need to manually extract information from the Department's web sites and/or files to produce a document containing the requested information.

On the basis of this advice, I am satisfied that the information you seek is not ordinarily available by use of the Department's computer systems. I am therefore satisfied that section 17(1)(c) of the FOI Act does not apply to your access request.

As I am satisfied that section 17(1)(c) of the FOI Act does not apply to your access request, I have considered whether section 24A also applies to your access request.

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

(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.

In the case of your access request, I am satisfied that the information to which you seek access is held by the Department in its computer systems, but that it is not able to be accessed by the ordinary use of those computer systems. I am therefore satisfied that the document which you seek to access does not exist.

For this reason, I have decided to refuse your access request under section 24A(1)(b)(ii) of the FOI Act.

## **8 Legislation**

A copy of the FOI Act is available at <https://www.legislation.gov.au/Details/C2017C00251>. If you are unable to access the legislation through this website, please contact our office for a copy.

## **9 Your Review Rights**

### *Review by the Office of the Australian Information Commissioner*

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <https://www.oaic.gov.au/freedom-of-information/foi-review-process>.



## **10 Making a Complaint**

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

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

Phone 1300 363 992 (local call charge)

Email [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

There is no particular form required to make a complaint to 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 the Department of Home Affairs as the relevant agency.

**Position 60007879  
Authorised Decision Maker  
Department of Home Affairs**