



Australian Government

Department of Communications

FREEDOM OF INFORMATION REQUEST No. 52-1314
Anonmouse, Right to Know

ACCESS DECISION
STATEMENT OF REASONS

I, Elizabeth Lawler, FOI Manager, Legal Division of the Department of Communications (**the Department**):

- (a) being authorised by the Secretary under subsection 23(1) of the *Freedom of Information Act 1982* (**the FOI Act**) to make decisions about access to documents under the FOI Act, and
- (b) required under section 26 of the FOI Act to provide a Statement of Reasons for my decision,

make the following statement setting out my findings on material questions of fact, referring to the evidence or other material upon which those findings were based and giving the reasons for my decision.

A. BACKGROUND

1. On 3 May 2014 Anonmouse, via the Right to Know website (**the Applicant**) emailed the Department requesting access to the following documents (**the FOI request**) under section 15 of the FOI Act:

"....any correspondence, email, written or otherwise, made between the Federal Communications Minister, Malcolm Turnbull, and/or his staff with the ABC, specifically regarding the NBN.

Of particular interest are communications regarding the coverage of the NBN on the political discussion program, "Q&A", and any directives, instructions, or requests the Minister or his staff gave or made to the ABC regarding their coverage of this issue."

2. The Department initially identified three documents originating with the Australian Broadcasting Corporation (**the ABC**) and on 30 May 2014, the Department consulted with the ABC in relation to content of those documents. It was subsequently established that these three documents did not actually fall within the scope of the FOI request, rendering the third party consultation with the ABC unnecessary.

B. DECISION

3. I have decided to refuse the Applicant's FOI request dated 3 May 2014 for access to documents under subsection 24A(1) of the FOI Act because upon the Department having taken reasonable steps to find relevant documents, I am satisfied there are no documents which exists that fall within the scope of the Applicant's FOI request.

C. FINDINGS ON MATERIAL QUESTIONS OF FACT

4. Enquiries were made with the relevant departmental staff members in the Communication Branch, the Broadcasting Division, and the Telecommunications Division of the Department, and staff of the Minister's Office regarding whether the requested documents existed, and a detailed search was conducted of all electronic departmental records.
5. These enquiries resulted in three documents being identified. The first two documents represented an email exchange between the ABC and the office of the Hon, Malcolm Turnbull MP (the **Minister**) regarding parking arrangements for the Minister's appearance on the ABC's Q&A programme on 28 April 2014. The third document is a group email to the panellist members (which included the Minister) on the ABC's Q&A television show on 28 April 2014 providing programming information about that show. Upon a closer examination by the Department, it was established that the three documents located initially by the Department did not in fact fall within the scope of the FOI request.

D. MATERIAL ON WHICH MY FINDINGS OF FACT ARE BASED

6. I based my findings of fact on the following material:
 - the terms of the Applicant's FOI request dated 3 May 2014; and
 - consultation comments provided by the ABC.

E. REASONS FOR DECISION

7. In considering the reasons for my decision in relation to the Applicant's FOI request, I have had regard to the relevant provisions of the FOI Act and the following relevant Guidelines:
 - the Freedom of Information Guidelines made under section 93A of the FOI Act by the Office of the Australian Information Commissioner (**the OAIC Guidelines**); and
 - the Department's *Guidelines for Processing Freedom of Information Requests* (July 2011).

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

8. Subsection 24A(1) of the FOI Act relevantly provides:

“Document lost or non-existent

(1) An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps having been taken to find the document;

(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.”

9. The FOI Act is silent about what an Agency must do in terms of searching for documents that may be relevant to a request, that is, it does not provide guidance as to the meaning of ‘reasonable steps’. Paragraph 3.43 of the OAIC Guidelines provides that:

“Agencies 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 practice in the agency’s environment. At a minimum, an agency or minister 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 records management systems in place;*
- the individuals within an agency who may be able to assist with the location of documents; and*
- the age of the documents.”*

10. Further, paragraph 3.45 of the OAIC Guidelines provides that the Information Commissioner considers that, as a minimum, an Agency should conduct a search by using existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.

11. The Department conducted a thorough search of its electronic (Information Management System) and hard copies file records. The Department also made necessary enquiries with relevant staff members in the Communication Branch, the Broadcasting Division, and the Telecommunications Division of the Department and staff of the Minister’s Office.

12. This resulted in the location of three documents described in paragraph 5 above of this Statement of Reasons.

13. In my view the three documents which were initially identified do not whatsoever contain any ‘directives, instructions or requests’ from the Minister or his staff to the ABC regarding the NBN. Accordingly, these three documents do not fall within the scope of the Applicant’s FOI request.

14. Even if the third document did fall in fact within the scope of the Applicant's request, which I have determined it does not, I note that it would be an exempt document under Division 1 Part II of the FOI Act – Agencies exempt in respect of particular document, as it represents the ABC's 'program material'.
15. Therefore, I am satisfied the Department has taken all reasonable steps to find the documents that are subject of this FOI request and there are no documents which exist that fall within the scope of the Applicant's FOI request. Accordingly, I have decided to refuse the Applicant's FOI request under subsection 24A(1) of the FOI Act.

F. REVIEW RIGHTS

16. This decision is subject to review under section 54, 54L or both of the FOI Act. The OAIC's *FOI Fact Sheet 12 – Your review rights* is attached.



Elizabeth Lawler
FOI Manager
Legal Division

4 July 2014