



8 August 2020

Mr John Smith

**BY EMAIL:** [foi+request-6461-5f2d74d0@righttoknow.org.au](mailto:foi+request-6461-5f2d74d0@righttoknow.org.au)

**In reply please quote:**

FOI Request: FA 20/07/00200-R1

File Number: OBJ2020/22646

Dear Mr Smith

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

I refer to your correspondence dated 10 August 2020 in which you requested that the Department of Home Affairs (the Department) review its decision on access to documents dated 7 August 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 contains the total number of non-APS staff, filling equivalent roles to actual APS staff in your department.*

*Typically these employees are ostensibly employed through labour hire agencies, and fulfil functionally equivalent roles to their colleagues.*

#### **2 Original Decision on access dated 7 August 2020**

The Department conducted reasonable searches and found no documents that fell within the scope of your original request. As such, a decision was made under section 24A of the Act to refuse access to the documents sought.

#### **3 Request for Internal Review**

On 10 August 2020, you requested the Department to review its decision dated 7 August 2020. In your request, you stated:

*I seek internal review of this decision on the ground that the document should be produced under s17(1) of the act.*

On 27 August 2020, after consultation with FOI Reviews, you agreed to revise the scope of your internal review to be the:

*'total number of number of non-APS staff employed by the Department' on today's date'*

AND

*'total number of number of non-APS staff employed by the Department' on today's date fulfilling roles equivalent to actual APS officers'*

AND

*'please include a list of position titles of all non-APS staff at the department. You may omit repeated position titles. Please indicate the number of non-APS staff that hold that title.'*

I have interpreted this request to be for information relating to non-APS staff employed by the Department in contractor roles current at 27 August 2020.

#### **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 7 August 2020 and the evidence gathered for that decision
- your revised internal review scope of 27 August 2020
- 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:

- release one document in full
- refuse access to one document in full under section 24A of the FOI Act on the basis that the document does not exist.

#### **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. These searches included additional consultation with the

responsible business area. During these searches, an additional one document was identified as relevant to the scope of the revised internal review request. This document relates to parts one and three of your revised internal review request. I have decided to release this document to you in full.

My decision in relation to part 2 of your request is stated below.

#### Section 17(1) and 24A assessment

You have requested access to the *'total number of number of non-APS staff employed by the Department' on today's date fulfilling roles equivalent to actual APS officers'*.

On 27 August 2020, the responsible business area advised that it does not hold information as to the *'total number of number of non-APS staff employed by the Department' fulfilling roles equivalent to actual APS officers'*.

The business area had earlier advised that that there would be no correlation between the *'total number of non-APS staff employed by the Department'* reported by the Department and the *'number of non APS staff filling equivalent roles to actual APS staff'*. This is because the contractor positions, and the number of them, are not necessarily otherwise equivalent to APS roles.

Section 17 of the FOI Act is relevant to consideration of whether a practical refusal reasons exists in relation to the information you have requested.

#### **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 carefully considered whether Section 17(1)(c)(i) of the FOI Act is relevant to your access request.

The FOI Guidelines relevantly explain [3.207] that in *In Collection Point Pty Ltd v Commissioner of Taxation* 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'.*

On the basis of the advice provided by the responsible business area, I am satisfied that the information you seek is not held by the Department in discrete form, and could not be produced via ordinarily available 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 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 not held by the Department in discrete form or could be produced via ordinary use of its computer systems. I am therefore satisfied that the document you seek does not exist. For this reason, I have decided to refuse your access request under section 24A(1)(b)(ii) of the FOI Act.

The schedule of the document that fall within the scope of your Internal Review at **ATTACHMENT A** sets out the decision on access and, where appropriate, refers to various sections 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.



**Andrea**

**Position Number** 60086901

**Authorised Decision Maker**

**Department of Home Affairs**

**ATTACHMENT A**

**SCHEDULE OF DOCUMENTS  
REQUEST UNDER *FREEDOM OF INFORMATION ACT 1982***

**FOI request:** FA 20/07/00200-R1

**File Number:** OBJ2020/22646

<b>N o.</b>	<b>Date of document</b>	<b>No. of pages</b>	<b>Description</b>	<b>Decision on release</b>
1.	27 August 2020	2	External Jobs headcount as at 27 August 2020	Release in full
2.	N/A	N/A	'Total number of number of non-APS staff employed by the Department' on today's date fulfilling roles equivalent to actual APS officers'.	Refused in full under 24A