



Our Ref: LS5069 ~ file 14/531

Mr Michael Cordover
By email to foi+request-648-a2719702@righttoknow.org.au

Dear Mr Cordover

Re Your FOI Request No. 5069

I refer to your email to Owen Jones, Senior Lawyer dated 26 June 2014 12:13 PM responding to my letter to you dated 26 June 2014 initiating a practical refusal consultation in relation to the above FOI Request.

- 2 I have noted your refusal to amend your FOI Request to remove the practical refusal reason identified in my letter to you of 26 June 2014.
- 3 The purpose of this letter is to give you a decision about access to documents that you requested under the [Freedom of Information Act 1982](#) (FOI Act).

SUMMARY

- 4 I, Paul Pirani, Chief Legal Officer of the AEC, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.
- 5 You requested access to documents relating to the schedule of relevant documents under the FOI Act (the 'FOI Request'). I have taken your request to be for:

Attachment B ("schedule of the relevant documents") to the letter from Owen Jones at the AEC to Tania Strathearn at the OAIC dated 17 April 2014, AEC ref LS4944 ~ file 13/945.
- 6 As explained in my letter to you of 26 June 2014, I had identified a practical refusal reason in relation to your FOI Request, namely that the work involved in processing your request in its current form would substantially and unreasonably divert the resources of the AEC from its other operations due to the complexity of the contentions made by you about access to the documents listed in the schedule of the relevant documents that is the subject of your request.

- 7 I identified one document that fell within the scope of your request. I did this by reviewing the AEC's correspondence with the Office of the Australian Information Commissioner in relation to your request for Information Commissioner review ('IC review') of the AEC's decision (affirmed on internal review) to refuse your FOI Request No. LS4849 for access to the EasyCount Software source code.
- 8 The annexed schedule of documents (Annexure 1) provides a description of each document that falls within the scope of your request and the access decision for each of those documents.
- 9 As you have declined to revise or withdraw your FOI Request I have decided to refuse your FOI Request under paragraph 24(1)(b) of the FOI Act.

DECISION AND REASONS FOR DECISION

Decision

- 10 With regard to Document No. 1 listed in Annexure 1 I have decided to refuse access under paragraph 24(1)(b) of the FOI Act.

Material taken into account

- 11 I have taken the following material into account in making my decision:
- (a) The content of Document No. 1;
 - (b) The correspondence between you and the AEC in relation to your FOI Request No. LS4849, namely:
 - (i) Your letter dated 11 December 2013 making your FOI Request No. LS4849;
 - (ii) My letter to you dated 4 November 2013 notifying you of my decision about your FOI Request No. LS4849;
 - (iii) Your email dated 8 November 2013 3:52 PM requesting internal review of my decision about your FOI Request No. LS4849;
 - (iv) Mr Rogers' letter to you dated 9 December 2013 notifying his decision about his review of my decision about your FOI Request No. LS4849;
 - (v) Your first submission to the Australian Information Commissioner in support of your request for an IC review of the AEC's decision to refuse your FOI Request No. LS4849.

This submission contains 188 paragraphs of which paragraphs 41, 42 and 51 to 62 address the issue of the schedule of documents;
 - (vi) The letter from Christopher Neugebauer addressed "to whom it may concern" dated 17 January 2014 provided by you to the Australian Information Commissioner;

- (vii) The letter from Owen Jones, Senior Lawyer of the AEC to Tania Strathearn, Office of the Australian Information Commissioner dated 17 April 2014;
- (viii) Your second submission to the Australian Information Commissioner in support of your request for an IC review of the AEC's decision to refuse your FOI Request No. LS4849.

This submission contains 122 paragraphs of which paragraphs 4 to 31 address the address the issue of the schedule of documents;
- (ix) Your email dated 13 June 2014 3:57 PM making your FOI Request No. LS5069;
- (x) My letter to you dated 26 June 2014 initiating practical refusal consultation in relation to FOI Request No. LS5069; and
- (xi) Your email to Owen Jones dated 26 June 2014 12:13 PM notifying your election under paragraph 24AB(6)(c) of the FOI Act not to revise your FOI Request No. LS5069;
- (c) the FOI Act (specifically sections 22, 24, 24AA, 24AB and 47); and
- (d) the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the 'Guidelines') (specifically paragraphs 1.21, 3.57 to 3.74 and 5.181 to 5.191).

Reasons

- 12 The schedule in Annexure 1 indicates each document to which access is refused. My reasons for refusing access are given below.
- 13 I have noted the advice from the Office of the Australian Information Commissioner ('OAIC') that:

"... an agency's decision to provide or not to provide a schedule of documents with an FOI decision is not something that the OAIC can review - it is not an 'access refusal decision' as defined in s 53A of the FOI Act."
- 14 I do not see that statement as justifying you making your current FOI Request. The reason why your current FOI Request is inappropriate is that it raises the same considerations about access to the schedule of documents, namely whether the names of the documents listed in the schedule, risk exposing the trade secret relating to the EasyCount Software as raised by FOI Request LS4849.
- 15 Resolution of that question depends on establishing the existence of the trade secret. This will be the central issue in the application to the Administrative Appeals Tribunal ('AAT') by you to review the AEC to refuse your FOI Request No. LS4849.
- 16 Your current FOI Request is inconsistent with your second submission to the OAIC in relation to your request for IC review of AEC decision to refuse your FOI Request No. LS4849. In this regard, I direct your attention to paragraph 6 of your second submission in which you say:

6. Despite this, I would hope that the AEC will consent to treating the release of the schedule as though the FOI Act applies.
- 17 The approach proposed by you in paragraph 6 of your second submission to the OAIC should be applied to the AAT proceedings to review the AEC decision to refuse your FOI Request No. LS4849.
- 18 You also cited *Diamond and Australian Curriculum, Assessment and Reporting Authority [2013] AICmr 57* (the 'Diamond Decision') at [18] in support of his contention. The Diamond Decision, however, is not relevant to the circumstances where there is an overlap of applications for access to a document. The Diamond Decision is authority only for the proposition that there is no entitlement to obtain access under Part III of the FOI Act to a document that is within the open access period under the *Archives Act 1983* unless it contains personal information (paragraph 12(1)(a) of the FOI Act); is publicly accessible, as part of a public register or otherwise, subject to a charge (paragraph 12(1)(b) of the FOI Act); is publicly accessible, as part of a land title register, subject to a charge (s 12(1)(ba)); or is available for public purchase (paragraph 12(1)(c) of the FOI Act). The underlying issue here is the application of section 47 of the FOI Act to preserve a trade secret. This issue lies at the heart of both FOI Request No. LS4849 and FOI LS5069.
- 19 If the decision of the AAT in its review of the AEC decision to refuse your FOI Request No. LS4849, is that there is no trade secret then a schedule of documents would be prepared in relation to the documents released by the AAT. However, if the AAT decided the other way, then the question arises whether the listing of the documents in the schedule would involve disclosing exempt material in as much as the identity of the documents is part of the trade secret and after that the further question whether a meaningful document could be disclosed after the document was edited to redact the exempt material.
- 20 It is an abuse of process for you to seek to achieve indirectly that which you have been informed by OAIC cannot be achieved by you directly, namely having access to a schedule of documents in relation to your FOI Request No. LS4849.
- 21 It is also vexatious for you to involve the AEC in separately having to canvass issues arising in relation to your foreshadowed AAT application. Although the issues have been already canvassed, there is considerable effort required to make a separate decision on your current FOI Request inasmuch as I am, as a decision maker, obliged to make a fresh decision addressing all the circumstances relating to your current FOI Request. This necessitates setting aside the reasoning of the earlier AEC decisions on your FOI Request No. LS4849 and giving consideration to all the circumstances relating to your current FOI Request. This involves several days work in preparing a recommendation for my consideration and the time for me to give proper consideration to that recommendation.
- 22 The purpose of my letter to you of 26 June 2014 was to give you the opportunity to reconsider your FOI Request with a view to revising it to avoid the unnecessary further consideration by the AEC of the issues that will be addressed in the forthcoming AAT review of the AEC decision to refuse your FOI Request No. LS4849. As you have chosen to insist on your current FOI Request as stated in your email dated 13 June 2014 3:57 PM, I find that the practical refusal ground

identified in my letter to you of 26 June 2014 continues to apply to the current FOI Request. Accordingly, it is open to the AEC to refuse your FOI Request on that ground, namely:

that the work involved in processing your request in its current form would substantially and unreasonably divert the resources of the AEC from its other operations due to the complexity of the contentions made by you about access to the documents listed in the schedule of the relevant documents that is the subject of your request.

I have noted, but do not accept, your contention that my consideration that FOI Request No. LS5069 is vexatious is not a relevant consideration as to whether a practical refusal reason exists (s 24AA(3)). It seems that you rely on the operation of paragraph 24AA(3)(b) of the FOI Act which is directed to excluding any intention (actual or imputed) of the applicant in making an FOI Request.

You have misconceived the law applying to vexatious proceedings which is directed to the objective effect of the relevant proceeding on the respondent: see [Oceanic Sun Line Special Shipping Company Inc v Fay \[1988\] HCA 32; \(1988\) 165 CLR 197 \(30 June 1988\)](#) (the 'Oceanic Sun Line Case') and not to the intention of the applicant.

In the Oceanic Sun Line Case Brennan J at paragraph 6 of his reasons for judgment said:

In the well-known statement of principle in Scott L.J's judgment in *St. Pierre v. South American Stores* (at p 398) however, they were not used as directly descriptive of the conduct of the plaintiff but as descriptive of the objective effect which continuance of the action would have on the defendant: "the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him ...". On that approach which, in my view, should be accepted as correct, I do not think that one should read into the words a requirement that the continuance of the action would involve moral delinquency on the part of the plaintiff (note the contrary view expressed by Lord Kilbrandon in *The Atlantic Star*, at p 477 and by Lord Salmon in *MacShannon*, at pp 818-819). Rather, it seems to me that those words should be read, in the *St. Pierre* formulation, as describing and characterizing the objective effect, on balance, of a continuation of the particular forum as the venue of the proceedings rather than as describing the conduct of the plaintiff in selecting or persisting with that forum (cf. per Gibbs J., *Cope Allman*, at p 494: "the exercise ... of ... jurisdiction would be vexatious to the defendants or would result in any real injustice to them").

In my view the vexatious effect of the application falls within the ambit of subparagraph 24AA(1)(a)(i) of the FOI Act because processing FOI Request No. LS5069 would unreasonably divert the resources of the AEC from its other operations.

23 For these reasons I decided to refuse your FOI Request No. LS5069.

YOUR REVIEW RIGHTS

24 If you are dissatisfied with my decision, you may apply for internal review or Information Commissioner review of the decision. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

- 25 Under section 54 of the FOI Act, you may apply in writing to the AEC for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.
- 26 Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

- 27 Under section 54L of the FOI Act, you may apply to the Australian Information Commissioner to review my decision. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:
- online: <https://forms.australia.gov.au/forms/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW
- 28 More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews.

RELIEF AGAINST VEXATIOUS APPLICATIONS

- 29 I direct your attention to paragraph 1.21 of the Guidelines which states:
- 1.21 The Information Commissioner also has the power to declare a person to be a vexatious applicant. The Information Commissioner may exercise that power if satisfied that a person has engaged in FOI access actions that involve an abuse of process or if a particular request or application is manifestly unreasonable. Before making such a declaration, the Commissioner must invite the person involved to make a submission (see Part 12 of these Guidelines).
- 30 I intend to provide the Australian Information Commissioner with a copy of this letter and the following correspondence about your FOI Request No. LS6069:
- (a) Your email dated 13 June 2014 3:57 PM making your FOI Request No. LS5069;
 - (b) My letter to you dated 26 June 2014 initiating practical refusal consultation; and
 - (c) Your email to Owen Jones dated 26 June 2014 12:13 PM notifying your election under paragraph 24AB(6)(c) of the FOI Act to not revise your FOI Request No. LS5069.
- 31 I will also be drawing to the Australian Information Commissioner's attention FOI Request No. LS4912 by Mr M Landauer. I note that Mr Landauer, like you, makes his FOI Requests through the *Right to know* website (<https://www.righttoknow.org.au/>) see

https://www.righttoknow.org.au/request/machine_readable_document_from_w#comment-442. That circumstance and the subject matter of Mr Landauer's FOI Request No. LS4912 suggests a degree of collusion between you and Mr Landauer in making FOI Requests directed to securing publication of the source code of the AEC's EasyCount Software. Mr Landauer requested a machine readable copy of the scanned letter sent you following the AEC's refusal to send my letter to you dated 4 November 2013 notifying you of my decision about your FOI Request No. LS4849 in a different electronic format. The circumstances suggest that the request was intended to harass the AEC about its refusal to comply with your request. I will invite the Australian Information Commissioner to find that FOI Request No. LS4912 was made for your benefit.

32 I will ask the Australian Information Commissioner to make a declaration under subsection 89K(1) of the FOI declaring you to be a vexatious applicant.

33 In this regard, I direct your attention to Part 12 of the Guidelines generally and to paragraph 12.2 of the Guidelines which says:

Grounds for declaration

12.2 Before declaring a person to be a vexatious applicant the Information Commissioner must be satisfied that:

- (a) the person has repeatedly engaged in access actions that involve an abuse of process
- (b) the person is engaging in a particular access action that would involve an abuse of process, or
- (c) a particular access action by the person would be manifestly unreasonable (s 89L(1)).

34 The matters set out in paragraphs 29.

QUESTIONS ABOUT THIS LETTER

35 If you wish to discuss this letter, please contact Owen Jones, Senior Lawyer whose contact details follow:

Telephone: 02 6271 4528
Fax: 02 6293 7657
Email: owen.jones@aec.gov.au

Yours sincerely



Paul Pirani
Chief Legal Officer

4 July 2014

ANNEXURE 1.

LS5069 SCHEDULE OF RELEVANT DOCUMENTS

Request for:

Attachment B ("schedule of the relevant documents") to the letter from Owen Jones at the AEC to Tania Strathearn at the OAIC dated 17 April 2014, AEC ref LS4944 ~ file 13/945.

Document	Description	Date	Recommendation/Decision
1	Attachment B LS4849 Schedule of Relevant Documents This is an attachment to a letter dated 17 April 2014 from Owen Jones, Senior Lawyer, Australian Electoral Commission to Ms Tania Strathearn, Merit Review and Investigations Officer, Office of the Australian Information Commissioner	[undated]	<div>I recommend that you find that the practical refusal reason specified in your letter dated 26 June 2014 has not been resolved and that access be refused to Document No. 1 for that reason.</div> <div>I decide to refuse access to Document No. 1.</div>