



Statement of reasons made under the *Freedom of Information Act 1982*

Decision and reason for decision of Molly (Position Number 62213164), Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

Applicant: Jason (Right to Know)

Decision date: 24 September 2020

FOI reference number: FOI 37926

Sent by email: foi+request-6620-60c73cf0@righttoknow.org.au

Dear Jason (Right to Know)

Freedom of Information Request: FOI 37926

1. The Department of Veterans' Affairs (**Department**) has undertaken a reasonable search of its records and has not been able to identify a document 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 document does not exist. I have further refused your request subject to section 17 of the FOI Act, on the basis that the requested document is unable to be created via the use of a computer system that is ordinarily available to the Department.

Authority to make this decision

3. I, Molly (Position Number 62213164), Legal Officer, 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

4. On 20 August 2020, you made a request for access to documents in the possession of the Department. Your request was made in the following terms:

'...copy of the "FOI Manual" (which may be known under another name) under Part II of the Freedom of Information Act....'

5. Following informal consultation, on 23 August 2020 you revised your request as follows:

'...PDF copy of the complete FOI Manual, that provides FOI team with guidance on the steps for handling FOI requests...'

6. On 25 August 2020 during the course of informal consultation, the Department advised you that:

'The Department can proceed to process your request on the clarified scope below. However, in the interest of transparency, we advise that the Department does not currently have a complete FOI Manual at this point in time. Some valuable and comprehensive resources and guidance materials the Department refers to regularly in managing its FOI work are publicly available. Of importance, are the useful FOI resource materials and FOI Guidelines issued by the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/> and also the Department of the Prime Minister and Cabinet's FOI Handbook which can be found at <https://www.ag.gov.au/sites/default/files/2020-03/FOI%20Guidance%20Notes%20-%20PDF.pdf>.'

7. As no extensions of time have been applied to process your request, a decision on your request was due by 21 September 2020. The Department did intend to notify this decision on 21 September 2020, however was unfortunately able to finalise a decision within this time period. We apologise for this inconvenience.
8. The Department will notify the OAIC of this error and request a small extension of time under section 15AC of the FOI Act, so that the decision is not considered deemed refused. This extension of time will not impact on the decision issued to you, or your review rights.

Material taken into account

9. 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 requested documents follows.
10. I have taken the following material into account in making my decision:
- the terms of your request and as revised;
 - the types of information and documents that are in the Department's possession;

- searches undertaken by relevant business areas of the Department;
- consultation with relevant Department officers in relation to your request;
- the availability of information relevant to your request, insofar as it determines the practicality and ease in which the Department can create a document under section 17 of the FOI Act;
- 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;
 - Section 11B Public interest exemption – factors
 - Section 15 Request for Access
 - Section 17 Requests involving use of computers etc. (e.g. request for the Department to create a document)
 - Section 24A Requests may be refused if documents cannot be found, do not exist or have not been received
- the guidelines issued by the Office of the Australian Information Commissioner (**OAIC**) under section 93A of the FOI Act.

11. A full extract of all FOI Act provisions used to make my decision are provided in **Schedule 2**.

Reasons for decision

12. I have decided to refuse your request in accordance with the following provision in the FOI Act:

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

13. 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 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.

14. 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 and as revised;
 - the subject matter of the documents;
 - the Department's current and past file management and record practices; and
 - the individuals and areas within the Department who may be able to assist with the location of the information you seek access to.
15. Despite the reasonable searches undertaken, the Department has been unable to identify documents relevant to your request. I am satisfied that the requested document does not exist. A description of the searches undertaken to locate the documents which you are seeking to access is at **Schedule 1**.

Your rights of review

16. If you are dissatisfied with my decision, you may apply for Internal Review or request the Office of the Australian Information Commissioner (**OAIC**) to review my 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

17. Under section 54 of the FOI Act, you may apply in writing to the Department for an Internal Review of my decision. The Internal Review application must be made within 30 days of the date of this letter. 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.
18. You can make your application for internal review in one of the following ways:
- Post:** Legal Services and Assurance Branch, Department of Veterans' Affairs
GPO Box 9998 CANBERRA ACT 2601
 - Facsimile:** (02) 6289 6337
 - Email:** information.law@dva.gov.au

OAIC review

19. Under section 54L of the FOI Act, you may apply to the OAIC to review my decision. An application for review by the 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

Post: Office of the Australian Information Commissioner
GPO Box 5218, Sydney NSW 2001

Facsimile: (02) 9284 9666

Email: enquiries@oaic.gov.au

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

20. 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

21. If you wish to discuss this decision, please do not hesitate to contact me using the following details:

Post: Legal Services and Assurance Branch, Department of Veterans' Affairs
GPO Box 9998 CANBERRA ACT 2601

Facsimile: (02) 6289 6337

Email: information.law@dva.gov.au

Yours sincerely

Molly (Position Number 62213164)

Legal Officer

Information Law Section

Legal Services and Audit Branch

24 September 2020



Summary of document searches

The Department conducted the following searches to identify files and documents that fall within scope of your request (**relevant documents**).

I consulted with the following relevant business area of the Department in relation to your request:

- The Legal Services and Audit Branch (**the Branch**)

The Branch conducted searches for the documents described in your request. Searches were undertaken of both the Department's electronic and physical file management systems. At the conclusion of these searches, no documents matching the description of your request were located.

As communicated to you in the Department's email on 25 August 2020, the Branch advised the Department does not currently have a complete FOI Manual at this point in time. The Department refers to publicly available FOI resources and guidance materials including the FOI resource materials and FOI Guidelines issued by the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/> and also the Department of the Prime Minister and Cabinet's FOI Handbook which can be found at <https://www.ag.gov.au/sites/default/files/2020-03/FOI%20Guidance%20Notes%20-%20PDF.pdf>. The Department considers that this approach ensures that the Department maintains reference to the most up to date and accurate FOI guidance material.



Schedule of relevant provisions in the FOI Act

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).

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.

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.

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).