



30 September 2020

Alex

BY EMAIL: foi+request-6668-055b7e13@righttoknow.org.au

In reply please quote:

FOI Request: FA20/09/00043-R1

File Number: ADF2020/61138

Dear Alex

Decision on Internal Review – Freedom of Information Act 1982

I refer to your correspondence dated 4 September 2020 in which you request that the Department of Home Affairs (the Department) review its decision on access to documents dated 2 September 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:

Please provide a list of all EOI's that were issued an invitation to apply for a 190 Visa and nominated by NSW for the period between 01 January 2019 and 31 August 2020 showing:

- a) Date of Invitation*
- b) ANZSCO code of occupation*
- c) Occupation description*
- d) Total points (including those points for NSW state nomination)*
- e) Primary applicants English proficiency*
- f) Date of lodgement of the EOI*

2 Original Decision on access dated 4 September 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.

The Department also found that, pursuant to section 4 of the FOI Act, which provides that that a document for the purpose of the FOI Act does not include material maintained for reference purposes that is otherwise publically available, the information you sought in your request is publically available. The Department has made information on Expression of Interest (EOI) statistics available to the public by its publication on the SkillSelect dashboard.

3 Request for Internal Review

On 4 September 2020, you requested the Department to review its decision of 2 September 2020. In your request, you stated:

'I kindly request a review of your decision as the level of detail required is not available through the online EOI data portal, as mentioned in my previous request (and hence why this request was made). Please action my FOI request as originally requested, thank you'.

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 4 September 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).

5 Internal Review Decision

I have reviewed your original request and I have considered the submissions made by you in relation to your reasons for requesting an Internal Review.

I have decided:

- to set aside the Department's original finding that the information to which you seek access is 'otherwise publicly available' and that, pursuant to section 4(d) of the FOI Act, a document containing the information is not a document under the FOI Act
- to affirm the original decision of the Department to refuse your request under section 24A of the FOI Act, including by way of a finding that section 17(1) of the FOI Act does not apply.

I have provided the reasons for my decision below.

6 Reasons for Internal Review Decision

Whether material maintained for reference purposes that is otherwise publicly available

4 Interpretation

"document" includes:

(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

As the Department advised you in the original decision, section 4(d) of the FOI Act provides that 'material maintained for reference purposes that is otherwise publically available' is not a document under the FOI Act. In its original decision, the Department found that the information you are seeking is published on the SkillSelect dashboard, thereby attracting section 4 of the Act.

I have considered your comments that the information you are seeking is not available via the Skill Select dashboard. I am satisfied that only parts of the information to which you seek access are 'otherwise publically available'. I have accordingly set aside the Department's original decision to rely on section 4(d) of the FOI Act to find that the right of access does not apply to the information in question.

Whether reasonable steps taken to find documents

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.*

Section 24A of the FOI Act provides that the Department may refuse access to a document when the Department has taken all reasonable steps to locate the document, and the document cannot be found or does not exist.

I have reviewed the original decision and remain satisfied that the Department has taken all reasonable steps to locate relevant discrete documents. I have made this finding on the basis that the information to which you seek access is of a nature not held in discrete, hard copy format.

However, before an agency can refuse a request under section 24A of the FOI Act, section 17 of the FOI Act provides that the Department must also conduct searches of its computer systems to determine whether the information is held on those systems, and whether a written document could be produced from these systems.

The information to which you seek access is known to be contained in non-discrete form in Departmental computer systems. I now give consideration to whether the Department is able to produce a written document from these systems pursuant to section 17 of the FOI Act.

Whether the Department can produce written document containing information in discrete form

Section 17 of the FOI Act describes circumstances in which an agency may be required to prepare new documents in response to an FOI request, as follows:

17 Requests involving use of computers etc.

(1) Where:

- (c) *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;*
- (d) *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*
- (e) *the agency could produce a written document containing the information in discrete form by:*
 - (iii) *the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*
 - (iv) *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 the information you wish to access is not available via ordinary use of the Department's computer systems. The business area instructs that it would need to take an extraordinary step to retrieve, collate and produce a document containing this information, involving the manual interrogation of a computer system. It further advises that since the launch of the SkillSelect portal, such manual interventions are no longer part of its ordinary business functions, and would subsequently require a diversion of resources from its other operations. On the advice of the business area, I am satisfied that the manual interrogation of systems for the data now represents 'non-ordinary' use of a computer by the business area.

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.

I have therefore decide that the Department has taken all reasonable steps to find the document that falls within the scope of the request as it was required to do by section 24A of the FOI Act, and that:

- a discrete document does not exist
- the Department cannot produce a written document containing the information by the use of a computer or other equipment that is ordinarily available, as would otherwise be required by section 17 of the FOI Act.

On this basis, I refuse your access request under section 24A of the FOI Act.

7 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.

8 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>.

9 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

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.

**Rebecca
FOI Reviews Officer
Authorised Decision Maker
Department of Home Affairs**