



Internal review decision made under the *Freedom of Information Act 1982*

Decision and reason for decision of Chantal (Position Number 62212962), Legal Officer, Information Law Section, Legal Services and Audit Branch, Department of Veterans' Affairs

Applicant: Julie (Right to Know)

Date of primary decision: 2 October 2020

FOI reference number (Primary): FOI 38006

Internal review decision date: 23 November 2020

Internal review reference number: IR 39326

Sent by email: foi+request-6682-0ef6c8ef@righttoknow.org.au

Dear Julie,

Freedom of Information Request: FOI 39326

Decision

1. The purpose of this letter is to give you a decision about your request for internal review under the *Freedom of Information Act 1982* (**FOI Act**).
2. I have made a decision to affirm the original decision made by primary decision maker Molly (Position Number 62213164), Legal Officer, Information Law Section. That decision was to refuse your request under section 24A of the FOI Act, on the basis that the Department has undertaken a reasonable search of its records and it is unable to identify a document relevant to your request, on the basis that no such document exists.

Authority to make this decision

3. I, Chantal (Position Number 62212962), 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 3 September 2020, you made a request for access to documents in the possession of the Department. Your request was made in the following terms:

'...I wish to obtain access to official information held by the Department of Veterans' Affairs under the Freedom of Information Act 1982. The official information sought is not available in discrete form, in the written documents of the agency, therefore I request the agency to produce a written document containing the information in discrete form by use of computer to retrieve and collate the stored official information sought.

I request access to such a compiled document that provides the following information in the layout requested:

From a FOI decision here on Right to Know it appears the Information Law section of the Department of Veterans' Affairs is made up of 9 positions, being an EL2 (position number 62209913), two EL1 (position numbers 62210326 & 62210022), two APS6 (position numbers 62210358 & 62214719), an APS5 (position number 62214547), an APS4 (position number 62210105), an APS 3 (position number 62214718), and a contractor (position number 62212962). It is possible there have been slight changes to the position establishment of Information Law since, but this is likely to still be current.

In either case, for all positions within the Information Law section that were filled during the period March to July inclusive, for 2020 and 2019, using the official records of duty (that is, staff member was recorded as on duty, and was not on personal leave or sick leave, in the Department's human management / pay systems), provide the cumulative number of available staff days for the periods of scope:

*Table.....March 2020 - July 2020.....March 2019 - July 2019 Available
Unavailable*

Again, as stated, an available staff day is count of each work day (so excludes weekends and public holidays) each filled position was available for duty (not on personal leave or sick leave). For example, on one work day there are three filled positions and all three are available for work, then the count for the day would be three (and if there were three filled position but only two were available for work and one was on sick leave for that

day, the count for the day would be 2 available, 1 unavailable), and so on. Flexi-time is ignored, as it is merely a transfer of days worked...’.

5. On 2 October 2020, the Department made its primary decision in respect to your request, and determined to refuse your request under section 24A of the FOI Act on the basis that the Department had undertaken a reasonable search of its records and has not been able to identify documents relevant your request because no document exists.
6. On 22 October 2020, you requested an internal review of the primary decision. In your request, you specifically noted:

‘... I am writing to request an internal review of Department of Veterans' Affairs's handling of my FOI request 'Staffing levels for Information Law Section'.

The delegate has misrepresented section 17 of the Act, in claiming "that [as] the Department is unable to [automatically] produce a document in response to your request at this time via the use of an ordinarily available computer system... no document exists". That section of the Act does not require that the compiling of information into a new document must be entirely by automated means and must not involve any human process as claimed by your delegate.

I am aware this is a recent repeated misleading claim made by the Department in a number of recent FOI decisions, such as to Mr Parnell, contrary to earlier prior FOI decisions made by the Department that involved section 17 and which were complied at least in part manually.

As such, this is a contemptuous practice by the Department, and one contrary to accepted FOI practice. It is regrettable that the Department has engaged in such bad faith, to obscure and hide matters of public interest.

Section 17(1)(c)(i) states that where an agency could produce a written document containing the information by using a ‘computer or other equipment that is ordinarily available’ to the agency for retrieving or collating stored information, then it must produce such a document. Notably, the relevant phrase is "computer or other equipment", which includes more than just the database it may reside in.

The Department's position is untenable, and would be subject to reversal on IC Review, therefore I recommend the Department is proactive and issues a correct decision on Internal Review.

A full history of my FOI request and all correspondence is available on the Internet at this address:

[https://www.righttoknow.org.au/request/staffing_levels_for_information'](https://www.righttoknow.org.au/request/staffing_levels_for_information).

7. On 16 November 2020, you sent an email advising that the acknowledgement of your request for internal review was “overdue” and that an automatic email reply which acknowledged receipt of your request was not sufficient. While the Department does endeavour to acknowledge requests made for internal review beyond the automatic email reply which serves to acknowledge receipt, I note section 54C of the FOI Act does not require a request for internal review to be acknowledged or the timeframe for the making of the internal review decision (unlike section 15 of the FOI Act, for example).
8. As no extensions of time have been applied to process this internal review, a decision on your internal review request is due by 23 November 2020.

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 grant full access to the document follows.
10. In making my decision, I have had regard to the following factors:
 - the terms of your request (set out in paragraph 4 above);
 - the terms of your request for an internal review (set out in paragraph 6 above);
 - the types of information and documents that are in the Department’s possession;
 - the content of the document that fall within the scope of your Revised Scope request;
 - 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. I also considered the following provisions of the FOI Act relevant to my decision:
 - 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 Australian Information Commissioner under section 93A of the FOI Act (**FOI Guidelines**); and
- the consultations with the relevant business areas of the Department.

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 affirm the Department's original decision to refuse your request in accordance with section 24A of 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;
- the subject matter of the documents;
- the current and past file management systems and the practice of orderly destruction or removal of documents;
- the Department's record management systems and 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. While the FOI Act does not define what constitutes 'all reasonable steps' for the purposes of section 24A of the FOI Act, the FOI Guidelines (at paragraph 3.88) confirm that the meaning of 'reasonable' in the context of section 24A(1)(a) of the FOI Act has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as it judged to be appropriate or suitable to the circumstances or purpose (citing *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138).
16. I have reviewed the searches undertaken to locate the documents to which you are seeking access, and include a description of the searches undertaken to locate the documents in **Schedule 1**. I consider these searches are reasonable for the purposes for section 24A of the FOI Act. The searches are directed to the relevant branch within the Department which holds documents of this kind. That branch undertook searches across a number of the Department's storage locations including personal emails, positional mailboxes, and various interdepartmental information holding systems. I consider these searches appropriate having regard to the terms of your request and not extravagant, excessive or unreasonable.
17. Despite the reasonable searches undertaken, the Department has been unable to identify documents relevant to your request. I am satisfied that this is because the requested document does not exist.
18. For these reasons, I am refusing your request for access to documents as described in your request in accordance with section 24A of the FOI Act.

Requests involving use of computers etc (section 17)

19. I note in its original decision the Department also considered whether the Department could create a document in response to your request in accordance with section 17 of the FOI Act. I have also considered whether such a document could be created under section 17 of the FOI Act.
20. Section 17(1) of the FOI Act states that 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 the Department;

- (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 Department;
- (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 Department 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.

21. Additionally, section 17(2) of the FOI Act provides that the Department is not required to comply with subsection 17(1) of the FOI Act if compliance would substantially and unreasonably divert the resources of the Department from its other operations.
22. I affirm the decision of the Department in its original decision that, having regard to the consultation undertaken with the relevant business area of the Department, the Department is unable to create a document in response to your request via the use of a computer system that is ordinarily available to the Department (see paragraph [17] of the original decision). The relevant business area advised that the creation of such a document would require the manual extraction and manipulation of data, meaning that the Department is unable to produce a document in response to your request at this time via the use of an ordinarily available computer system.
23. I note in your request for internal review you make a number of comments in relation to the original decision maker's reliance on section 17 of the FOI Act. In particular, you raise the following concerns:
 - you state the original decision maker misrepresented section 17 of the FOI Act by claiming that it only applies in circumstances where the Department can create a document by an "*automated*" means only and without any human intervention; and

- section 17(1)(c)(i) of the FOI Act states that where an agency could produce a written document containing the information by using a ‘computer or other equipment that is ordinarily available’ to the agency for retrieving or collating stored information, then it must produce such a document. Notably, the relevant phrase is “*computer or other equipment*”, which includes more than just the database it may reside in.

24. I do not understand the original decision maker to be saying that section 17 of the FOI Act does not apply where manual (human) intervention is involved. Section 17 of the FOI Act requires an agency to produce a written document *of information that is stored electronically* and not in a discrete written form, unless it appears from the request that the applicant wishes to be provided access to the information on computer disk or tape, or unless producing the document would substantially and unreasonably divert the resources of the agency from its other operations.
25. The FOI Guidelines (at paragraph 3.204) provide, by way of example, a written compilation of information held across various agency databases. I consider this may involve some manual (human) intervention to search for and extract information held on various databases.
26. However, section 17 only applies where the agency already holds the information to which access is sought – it does not go so far as to require an agency to extract information from its database or external sources to create a new document (see *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57 [19]–[22]).
27. In circumstances where the document to which you are seeking access does not exist, or where the data you seek access to does not exist or is not readily available, section 17 of the FOI Act does not apply – the FOI Act gives you a legally enforceable right to access documents *that already exist*, and an agency is not required to create a new document to satisfy an FOI request (see FOI Guidelines paragraph 3.202).

Summary of Decision

28. In summary, I am satisfied that, after having undertaking reasonable searches, the documents to which you seek access do not exist and that your application should be refused under section 24A of the FOI Act.

Your rights of review

29. Under section 54L of the FOI Act, you may apply to the Office of the Australian Information Commissioner (**OAIC**) to review my decision. An application for review by 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

30. 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

31. If you wish to discuss this decision, please do not hesitate to contact the Information Law Section using the following details:

Post: Legal Services and Audit Branch, Department of Veterans' Affairs
GPO Box 9998, Canberra ACT 2601
Facsimile: (02) 6289 6337
Email: Information.Law@dva.gov.au

Yours sincerely,

Chantal (Position Number 62212962)

Legal Officer
Information Law Section
Legal Services and Audit Branch

23 November 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**).

The Information Law Section consulted with the People Services Branch (the **Branch**) in relation to your request. The Branch undertook searches for documents meeting the description of your request in several of the Department's storage locations including personal emails, positional mailboxes, and various interdepartmental information holding systems.

As a result of these searches, the Branch advised that documents relevant to your request could not be located.

The Branch advised that would require manual data extraction and manipulation across both the People Service Branch and the Legal Services and Audit Branch. Specifically, to produce the records for APS staff alone the Department would be required to:

- Run multiple APS staffing occupancy and leave reports for the date periods listed in your request.
- Crosscheck the names of each APS staff member captured by those reports with other Departmental records.
- Analyse leave reports to work out which days APS staff were unavailable and produce a calendar view of the requested date periods to take account of weekends and public holidays.

Further the Branch advised that is unable to run reports on Contractors in the same way as is it able to for APS employees. This means that multiple teams would be required to undertake a manual review of contractor records to source and provide the requested information. Ultimately requiring the production of a bespoke document.

Accordingly, I affirm the original decision that the request document is not available for creation via the use of a computer system ordinarily available to the Department.



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:
- a document of the agency; or
 - 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).

15 Requests for access (as related to the requirements for requests)

Persons may request access

(1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

Requirements for request

- (2) The request must:
 - (a) be in writing; and
 - (aa) state that the request is an application for the purposes of this Act; and
 - (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
 - (c) give details of how notices under this Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication).
- (2A) The request must be sent to the agency or Minister. The request may be sent in any of the following ways:
 - (a) delivery to an officer of the agency, or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory;
 - (b) postage by pre-paid post to an address mentioned in paragraph (a);
 - (c) sending by electronic communication to an electronic address specified by the agency or Minister.

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.
(see section 11A).

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).