



1 December 2020

Fergus Peace

**BY EMAIL:** [foi+request-6863-6fa502f0@righttoknow.org.au](mailto:foi+request-6863-6fa502f0@righttoknow.org.au)

**In reply please quote:**

FOI Request: FA 20/11/00234-R1

File Number: OBJ2020/34837

Dear Mr Peace

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

I refer to your correspondence dated 16 November 2020 in which you request that the Department (the Department) review its decision on access to documents dated 12 November 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:

- '- Primary visa applications for subclass 188 (Business Innovation & Investment, Provisional), by stream and sponsoring state/territory, for each financial year from 2012-13 through to 2019-20*
- Primary visa applications for subclass 132 (Business Talent), by stream and sponsoring state/territory, for each financial year from 2012-13 through to 2019-20*
- Primary visa grants for subclass 188 (Business Innovation & Investment, Provisional), by stream and sponsoring state/territory, for each financial year from 2012-13 through to 2019-20*
- Primary visa grants for subclass 132 (Business Talent), by stream and sponsoring state/territory, for each financial year from 2012-13 through to 2019-20..'*

**2 Original Decision on access dated 12 November 2020**

In accordance with section 17 of the FOI Act, the Department used its computer system to produce one document that contains information that falls within the scope of your request. The data produced in the document existed in the possession of the Department on 3 November 2020 when your FOI request was received. The original decision maker decided to:

- Release one document in full.

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

On 16 November 2020, you requested the Department to review its decision dated 12 November 2020. In your request you stated:

*'I would like to clarify that I would like the table with the total number of applications/grants for each stream and year, in addition to the sub-total for each sponsoring state/territory government. This was the format published in response to previous requests (eg. <<https://www.homeaffairs.gov.au/foi/files/2019/fa-190100268-documents-released.PDF>>) and I intended to compare the documents and trend, which is not possible with the table provided as the state subtotals are frequently suppressed and show only '<5'.'*

### **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 12 November 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).

### **6 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 refuse your request under section 24A of the FOI Act, 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.

### **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 enquiries with the relevant business area to determine whether the Department holds the document you have requested.

**24A Requests may be refused if documents cannot be found, do not exist or have not been received:**

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 documents, and the documents cannot be found or does not exist.

As advised above, the Department has conducted additional reasonable searches for documents within the scope of your request. The searches involved enquiries with the relevant business area to determine whether the Department held the documents you seek.

On 19 November 2020 and 30 November 2020 the relevant business area advised that they do not have resources to restyle data into a different format. The business area also advised with regards to immigration-specific data and as per current privacy guidelines, Departmental policy is to mask numbers which are less than five. This departmental policy was included in the caveats with the document released in the original decision. I have therefore made the finding that the documents you seek is of a nature not held in discrete, hard copy format.

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.

I have considered whether the Department is able to produce a written document from Departmental systems pursuant to section 17 of the FOI Act.

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:*

*3. the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or*

*4. 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 information you wish to access is not available via ordinary use of the Department's computer systems. The business area instructs that it does not have the resources to generate the document in the format requested. I consider it would need to take an extraordinary step in order to retrieve the data from the computer systems in the format requested. On the advice of the business area, I am satisfied that the creation of the requested document represents a '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.

## **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 as the relevant agency.

**Position No: 60007879**  
**Authorised Decision Maker**  
**Department of Home Affairs**