

File No. LS8302

Phillip Sweeney  
Right to Know

By email to [foi+request-6927-c8f932f8@righttoknow.org.au](mailto:foi+request-6927-c8f932f8@righttoknow.org.au)

Dear Mr Sweeney

### Your Freedom of Information Request No. LS8302

I refer your email dated 26 November 2020 1:07 PM to the Australian Electoral Commission (the 'AEC') in which you request under the [Freedom of Information Act 1982](#) (the 'FOI Act') access to documents about electronic voting or ballot counting machines.

2 I now write to provide you with a decision regarding access to documents that you requested under the FOI Act.

#### Summary

3 I, Owen Jones, Senior Lawyer, am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.

4 You requested access to documents relating to [subject of request]. Specifically you sought access to documents:

- (i) that would confirm whether electronic voting machines (as opposed to paper ballots) were used anywhere in Australia during the last Federal Election; and
- (ii) that would confirm whether paper ballot electronic/mechanical scanning and counting machines were used anywhere in Australia during the last Federal Election.

5 For convenience, I will refer to these as the 'Requested Documents'.

6 I was unable to find documents that fell within the scope of the first limb of your FOI Request for the reason that the AEC did not use electronic voting machines in the 2019 federal election or the 2020 by-elections for the Division of Eden-Monaro and the Division of Groom.

7 There is a document that falls within the scope of the second limb of your FOI Request, which for the reasons below, cannot be requested as a document under the FOI Act.

8 The schedule of documents in **Error! Reference source not found.** provides a description of that Relevant Document and the access refusal decision in respect of it.

9 It follows that there are no documents that may be accessed under the FOI Act in respect of your FOI Request which for that reason is refused.

10 My formal decision and reasons follow.

## **Decision and reasons for decision**

### ***Decision***

#### **Documents that do not exist**

11 With regard to the Relevant Documents that may fall within the scope of the first limb of your FOI Request, I have decided to refuse access by reason that subparagraph 24A(1)(b)(ii) of the FOI Act applies because they do not exist as a document of the AEC.

#### **Documents that cannot be requested**

12 With regard to the Relevant Document identified in Attachment A, I have decided to refuse access because the carve out in paragraph (d) of the definition of 'document' provided by subsection 4(1) of the FOI Act applies to that document with the consequence that the Relevant Document is not a document that may be requested in an FOI Request under Part III of the FOI Act.

### ***Material taken into account***

13 I have taken the following material into account in making my decision:

- (a) the content of the documents that fall within the scope of your FOI Request;
- (b) the [Commonwealth Electoral Act 1918](#) (the 'Electoral Act'), specifically section 6;
- (c) the FOI Act, specifically section 4, Part III in general, and in particular. Sections 15 and 24A; and
- (d) the guidelines ('[FOI Guidelines](#)') issued by the Australian Information Commissioner under section 93A of the FOI Act, in particular paragraphs 2.29–2.44; and 3.85–3.94.

### ***Reasons***

#### **Documents that do not exist**

14 Subparagraph 24A(1)(b)(ii) of the FOI Act permits access to a document to be refused where that document does not exist.

15 With respect to the class of documents described in the first limb of your FOI Request (the 'Non-Existent Documents') in your FOI Request, I found that no such documents exist as a document of the AEC.

### **Consideration**

16 The reason for making my finding in paragraph 15 (as mentioned in paragraph 6 of this letter) is that the AEC did not use electronic voting machines in the 2019 federal election or the 2020 by-elections for the Division of Eden-Monaro and the Division of Groom.

### **The AEC as an agency**

17 The AEC falls within the definition of an 'agency' for the purposes of the FOI Act as the following paragraphs explain.

18 The expression 'agency' is defined in subsection 4(1) of the FOI Act.

19 Insofar as is material section 4 of the FOI Act provides:

#### **4 Interpretation**

(1) In this Act, unless the contrary intention appears:

**agency** means a Department, a prescribed authority or a Norfolk Island authority.

**prescribed authority** means:

- (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council, other than:
  - (i) an incorporated company or association; or
  - (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of this Act; or
  - (iii) the Australian Capital Territory House of Assembly; or
  - (iv) the Legislative Assembly of the Northern Territory or the Executive Council of the Northern Territory; or
  - (vi) a Royal Commission; or
  - (vii) a Commission of inquiry; or

20 The AEC is an unincorporated body established for a public purposes by section 6 of the Electoral Act.

21 It follows that the FOI Act applies to the AEC.

### **Document of an agency**

22 Insofar as is material section 4 of the FOI Act provides:

#### **4 Interpretation**

(1) In this Act, unless the contrary intention appears:

**document of an agency**: a document is a **document of an agency** if:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or

## Refusal of access to non-existent documents

23 Insofar as is material, subsection 24A(1) of the FOI Act provides:

### **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:  
...
    - (ii) does not exist.

### **Outcome**

24 Accordingly, I am satisfied that each Non-Existent Documents has never existed as a document of the AEC for the purposes of the definition of the expression 'document of an agency' provided by section 4 of the FOI Act.

25 Consequently, I decided to refuse access to the Non-Existent Documents under subparagraph 24A(1)(b)(ii) of the FOI Act.

26 This disposes of the first limb of your FOI Request.

### **Documents that cannot be requested**

#### ***Carve out from the definition of a 'document'***

### **Findings**

27 Document No. 1 is material maintained for reference purposes by the AEC that is otherwise publicly available at the URL: cited in the entry for that document in Attachment A.

28 The reason for making my finding in paragraph 27 of this letter in respect of a document is given in the relevant entry in Attachment A for that document.

### **Consideration**

29 Section 15 of the FOI Act enables a person to seek access, among other things, to a 'document of an agency'. The AEC is an agency for the purposes of the FOI Act.

30 Insofar as is material, subsection 15(1) of the FOI Act provides:

### **15 Requests for access**

#### *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.

31 Section 15A of the FOI Act makes provision with respect to requests for access to personnel records and has no relevance to your FOI Request.

32 The expression 'document of an agency' is defined by subsection 4(1) of the FOI Act and is dependent on the definition given by that subsection to the word 'document'.

33 Insofar as is material, subsection 4(1) of the FOI Act provides:

#### **4 Interpretation**

(1) In this Act, unless the contrary intention appears:

**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.

**document of an agency:** a document is a **document of an agency** if:

- (a) the document is in the possession of the agency, whether created in the agency or received in the agency; or
- (b) in order to comply with section 6C, the agency has taken contractual measures to ensure that it receives the document.

#### **Outcome**

34 Accordingly, I refused access to Document No. 1.

#### **Your review rights**

35 If you are dissatisfied with my decision (which is deemed to be a refusal to grant access), 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***

- 36 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.
- 37 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.]

### ***IC review***

- 38 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.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR\\_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)

email:

[foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post:

GPO Box 5218 Sydney NSW 2001

- 39 More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

### **FOI Complaints**

- 40 If you are unhappy with the way we have handled your FOI request, please let us know what we could have done better. We may be able to rectify the problem. If you are not satisfied with our response, you can make a complaint to the Australian Information Commissioner. A complaint to the Information Commissioner must be made in writing. Complaints can be lodged in one of the following ways:

online:

[https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA\\_1](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1)

email:

[foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

post:

GPO Box 5218 Sydney 2001

- 41 More information about complaints is available on the Office of the Australian Information Commissioner at <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint/>.

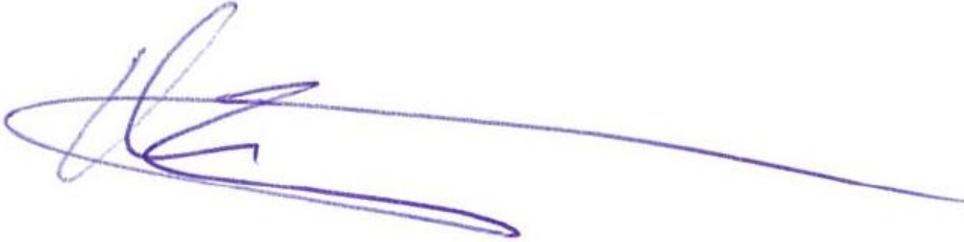
- 42 If you are not sure whether to lodge an Information Commissioner review or an Information Commissioner complaint, the Office of the Australian Information Commissioner has more information at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/>

## Questions about this decision

43 If you wish to discuss this decision, please contact me, using my details below:

email:	legal@aec.gov.au
fax:	02 6293 7657
post:	Locked bag 4007, Canberra ACT 2601
telephone:	02 6271 4528

Yours sincerely



Owen Jones  
Senior Lawyer  
**Legal Services**  
**Legal and Procurement Branch**

3 December 2020

## LS8302 FOI REQUEST BY PHILLIP SWEENEY, RIGHT TO KNOW

Request for documents:

- (i) that would confirm whether electronic voting machines (as opposed to paper ballots) were used anywhere in Australia during the last Federal Election; and
- (ii) that would confirm whether paper ballot electronic/mechanical scanning and counting machines were used anywhere in Australia during the last Federal Election.

noting that this would not include spreadsheets to tabulate voting results reported from manual ballot counts polling booths and mail-in voting centres.

## SCHEDULE OF RETRIEVED DOCUMENTS

Document No.	Description	Date
1	<p>AEC webpage <i>Central Senate Scrutiny</i> published at <a href="https://www.aec.gov.au/Voting/counting/central-senate-scrutiny.htm">https://www.aec.gov.au/Voting/counting/central-senate-scrutiny.htm</a></p> <p><b>RECOMMENDATION</b></p> <p>1.1 Document No. 1 is material maintained for reference purposes by the AEC that is otherwise publicly available at the universal reference locator ('URL') cited above.</p> <p>1.2 It is open to you to conclude that the carve out in paragraph (d) of the definition of a 'document' provided by subsection 4(1) of the FOI Act applies to Document No. 1.</p> <p>1.3 If you so conclude, it follows that Document No. 1 is not a document that may be requested under Part III of the FOI Act.</p>	30/04/2019

Document No.	Description	Date
	<p style="text-align: center;"><b>FINDING</b></p> <p>1.4 I have <b>found</b> that Document No. 1 is a document published by the AEC for reference by the public.</p> <p style="text-align: center;"><b>CONCLUSION</b></p> <p>1.5 I have <b>concluded</b> that the carve out in paragraph (d) of the definition of a 'document' provided by subsection 4(1) of the FOI Act applies to Document No. 1.</p> <p style="text-align: center;"><b>DECISION</b></p> <p>1.6 I have <b>decided to refuse access</b> to Document No. 1 because it is not a document that may be requested in an FOI Request under Part III of the FOI Act.</p>	

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End